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P. 20.3

# CASES

DETERMINED AT

NISI PRIUS,

IN THE

**Court of King's Bench,**

FROM THE

SITTINGS AFTER EASTER TERM, 30 GEO. III.

TO THE

SITTINGS AFTER MICHAELMAS TERM, 35 GEO. III.

BOTH INCLUSIVE.

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BY THOMAS PEAKE, ESQ.

OF LINCOLN'S INN, BARRISTER AT LAW.

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*THE THIRD EDITION CORRECTED,*

WITH SOME ADDITIONAL CASES, AND REFERENCES TO  
SUBSEQUENT DECISIONS.

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LONDON:

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1820.



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PRINTED BY THOMAS DAVISON, WHITEFRIARS.

## P R E F A C E.

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IN the following notes I have endeavoured to unite conciseness with perspicuity ; that I might equally avoid a tiresome and useless length of statement and an obscure brevity. In every case I have stated those circumstances which appeared to me to affect the question before the Court ; where arguments have been urged, I have attempted to report them ; and when any portion of the pleadings was necessary to elucidate the case, of such it has been my endeavour to give a faithful abstract.

As my desire was to preserve to the profession such cases *only* as had never yet appeared in print, I have omitted all those in which the same points afterwards came before the Court, and have been reported by the Gentlemen who record its decisions. I have forborne, on the same account, to report any of the cases with which Mr. *Espinasse* has lately favoured the profession (three only excepted) ; and it may naturally be expected that I should assign a reason for those exceptions.

The cases of *Knibbs v. Hall*, and of *Smith v. Jameson*, as *here* reported, contain *points* not noticed in that Gentleman's reports of those cases; and the case of *Ashley and Harrison* was so nicely distinguished from the case of *Tarleton and M'Gawley*, which was tried at the same Sittings, that a report of the latter would have been barely intelligible without it.

Understanding that it is the design of Mr. *Espinasse* to continue his reports, I think it incumbent on me to make an explicit declaration, that I have not any intention of adding a single case to those contained in the present volume; and thus I submit them to the candor of the profession.

*April, 1795.*

# ADVERTISEMENT

TO THE

THIRD EDITION.

---

NEARLY twenty-six years have elapsed since the first publication of the following cases. In the course of that time many of them have come under the consideration of the different Courts in *Westminster-Hall*, some have been made the foundation of other important cases, and others have been explained or rendered doubtful by contrary decisions. A new edition having been called for, the author would not have considered himself as doing his duty to the profession, had he suffered such edition to come before the public without a reference, at least, to all the subsequent analogous cases. In some instances, where many cases had occurred, a bare reference did not appear to be sufficient, and therefore in such cases the notes have necessarily extended to considerable length, forming, as it were, a short treatise on the particular point originally determined.

The research necessary to bring all the cases together requiring more time than could be spared from other engagements, the author has been obliged to avail himself of the assistance of a friend, and he should deem himself guilty of the greatest injustice to that friend (*Wm. Shutt, Esq. of the Middle Temple*), did he not acknowledge that to him the public is indebted for most of the references, and some of the notes contained in the present edition. The notes having much enlarged the work, it was found impossible to preserve the paging as in the first edition; but to render it as useful as possible to those who shall have occasion to refer to it from any other book wherein the first edition has been cited, a reference has been given to the pages of that edition in the margin of the present; and when references have been made from one part of the book to another, such references will be found to correspond with the original paging.

*Michaelmas Term, 1819.*

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# CASES IN K. B.

AT THE SITTINGS

AT NISI PRIUS,

AFTER EASTER TERM, 30 GEORGE III. 1790.

BRIDGES one, &c. v. FRANCIS.

THIS was an action of *assumpsit* brought by the Plaintiff for business done by him as agent for the Defendant, who was a country attorney.

It was objected that the bill was not signed.

LORD KENYON said, that signing a bill was necessary only where it was delivered to the proper client, and not where delivered by the agent to the attorney.

*Piggot* and *Garrow*, the Defendant's counsel, answered that they did not mean to contend that the bill should be signed and delivered a month previous to the commencement of the action as directed by the general attorney's act (a), but that this case was within the act of the 3 *Jac.* 1. c. 7. which,

(a) 2 *Geo.* 2. c. 23. It is provided by 12 *Geo.* 2. c. 13. s. 6. that this shall not extend to bills for business done by one attorney

Saturday,  
May 22d,  
1790. At  
Westminster.

An agent to a country attorney is not obliged to deliver a bill signed. *Nelson v. Garfuth*, 1 Esp. Cas. 221. S. P.

which, after enacting that no attorney, solicitor, or *servant* to any, should be allowed from his client or *master*, for any fee &c. unless he has a ticket subscribed &c. further enacts, that “all  
“attornies and solicitors shall give a true bill unto  
“their *masters* or clients, or their assigns, of all  
“other charges concerning the suits which they  
“have for them, subscribed with his own hand  
“and name, before such time as they or any of  
“them shall charge their clients with any the  
“same fees or charges.”

LORD KENYON said, he thought there was no weight in the objection, but that, if the Defendant desired it, he would save the point for the opinion of the Court.

The parties then agreed to refer the bill to the Master (a).

attorney for another, and it has been holden, that if an attorney do business for a man who is not at the time an attorney, but who becomes so previous to the commencement of an action for the recovery of the fees, he is within the exception enacted by the latter statute, *Ford v. Maxwell*, 2 H. Blac. 589.

(a) JONES one, &c. v. PRICE, K. B. May 19, 1748, before Lee Ch. Justice at Westminster. Case for agent's fees.

Mr. Pratt, who was Counsel for the Defendant, objected that it was incumbent on the Plaintiff to prove a bill delivered pursuant to the stat. of the 3 Jac. 1.

Mr. Hume and Mr. Ford, for the Plaintiff, answered, that agents were not within that statute. There was no such thing as an agent when that statute was made, the attornies then came to London to solicit their own causes. No settled fees are allowed to agents, nor has the Master power to tax their bills but by agreement of the parties.

LORD CH. JUSTICE LEE said, he was not inclined to nonsuit the

the Plaintiff in this case, it not being in his opinion within the statute, but he would reserve the point to be considered if the Defendant desired it.

Verdict for the Plaintiff.

Note. It is now usual to refer an agent's bill to the Master for taxation upon the attorney bringing the money into court. *Ex parte Bearcroft*, Dougl. 190. in notis. *Groome v. Symonds*, Tidd, 386, 5th ed.

\* KENNET and Another, Assignees, &c. v.  
GREENWOLLERS one, &c.

[ \* 3 ]  
*Wednesday,*  
*May 26th.*  
*At Westminster.*

*ASSUMPSIT* for money had and received.

The Plaintiffs called *Tyldesley* the bankrupt as a witness. He was examined on the *voir dire* by the defendant's counsel, and on such examination it appeared that this was the second time he had become a bankrupt. That under the first commission he had paid 16s. in the pound, but had not paid any dividend under the second commission, though he had obtained a certificate of his conformity.

A bankrupt who has not paid 15s. in the pound under a second commission cannot be a witness for the assignees under that commission, although he has obtained his certificate and released his allowance and surplus.

*Erskine*, for the Plaintiffs, admitted he would not be a competent witness without a release, but contended, that when a release was executed by him, he would be an admissible witness, as much as if only one commission had issued.

Lord KENYON. This differs from the case of a first commission, there the bankrupt can have no interest beyond his allowance and surplus: but here he is swearing to increase his estate, and by



that means to discharge his future effects, which remain liable under this second commission, until he pays 15*s.* in the pound. For in a second commission, the certificate does not discharge his future effects unless he pays that sum (*a*). This is a plain interest in the event of the cause, and makes him an incompetent witness.

He was therefore rejected, and the Plaintiffs not having any other evidence were nonsuited.

(*a*) 5 *Geo. 2. c. 30. § 9. Philpot v. Cordon*, 5 *T. Rep.* 287. *Haviland v. Cook*, *ib.* 655. *Gregory v. Martin*, 3 *Esp.* 195. 1 *Bos. and Pul.* 467. *Peake*, *Law Ev.* (341.) 391.

[ \* 4 ]

\* CRISTIE *v.* COWELL.

Words actionable in themselves as containing a charge of felony, if spoken in reference to a trespass or breach of contract, are not so.

THIS was an action for words. The words proved were, "He is a thief, for he has stolen my beer."

It appeared in evidence that the Defendant was a brewer, and that the Plaintiff had lived with him as servant; in the course of which service he had sold beer to different customers of the Defendant, and received money for the same, which he had not duly accounted for.

Lord KENYON directed the Jury to consider whether these words were spoken in reference to the money received and unaccounted for by the Plaintiff, or whether the Defendant meant that the Plaintiff had actually *stolen* beer; for if they referred

ferred to the money not accounted for, that being a mere breach of contract, so far explained the word "thief" as to make it not actionable. Thus if a man says to another "You are a thief, for you stole my tree," it is not actionable (a), for it shews he had a trespass and not a felony in his contemplation.

The Jury found for the Defendant (b).

(a) *Cro. Jac.* 114. *Bull. Nisi Prius*, p. 5, and 4 *Rep.* 13, 14. *Cro. J.* 66. Sir *T. Raym.* 33.

(b) *Vide Penfold v. Westcott*, 2 *Bos.* and *Pul. N. R.* 335. in which case the court held that the word thief, spoken together with many other words of general abuse, might be actionable or not, as the jury should understand the intent of the Defendant in speaking them. The jury having found for the Plaintiff the court refused to set aside the verdict, and Sir *J. Mansfield*, Chief Justice, said, "The manner in which the words were pronounced, and various other circumstances might explain the meaning of the word, and if the Jury thought that the word was only used by the Defendant as a word of general abuse, they ought to have found a verdict for the Defendant." On the other hand in *Wilson v. Stephenson*, 1 *Price*, 282, where the Jury found that words directly charging the Plaintiff with being a murderer, and having murdered his brother, were spoken by the Defendant, but not maliciously, on which a verdict was recorded for the Defendant. the Court of Exchequer would not grant a new trial on the ground that it was a verdict against evidence, although it had been proved on the trial that the words were spoken in anger, and it appeared that the Plaintiff had been the accidental cause of his brother's death. So in *Tempest v. Chambers*, 1 *Stark.* 67, where the Defendant having obtained a warrant against the Plaintiff for a supposed felony committed by him, but which in fact was a mere trespass, said to an agent of the Plaintiff's, "I have got a warrant for *Tempest*, I will advertise a reward of 20 guineas to apprehend him—I shall transport him for felony." Lord *Ellenborough*,  
in

in charging the Jury, said, " The Defendant probably thought " that as he had obtained a warrant, the Plaintiff had been guilty " of felony. The warrant was improperly granted; and if proper " attention had been paid to the circumstances it would not " have issued. This is different from the case of words spoken " without explanation to a stranger, since they were spoken to " one who had been employed as the Plaintiff's agent, and " arose out of the situation of the parties. He put his own " sense upon the warrant; I do not think he meant more. If " you are of opinion that he meant substantively to impute a " charge of felony, the Plaintiff will be entitled to your verdict, " but not otherwise." Where the words may be understood to convey either a charge of felony or fraud, although they would be actionable in the latter sense as well as the former, yet if the declaration contains an inuendo that the defendant thereby meant to impute felony to the Plaintiff, this is material, and must be made out in evidence. *Smith v. Carey*, 3 Camp. 461.

ROE dem. HENDERSON v. CHARNOCK.

Whether a year's notice to quit is necessary, when it has been the custom to give that notice. Qu.

**EJECTMENT** for common field lands, by landlord against tenant.

\* The Defendant attempted to shew that it was the custom of the country to give a year's notice to quit, whereas only half a year's notice had been given in the present instance.

[ \* 5 ]

Lord KENYON. I remember there was a cause some time ago where Lord *Mansfield* said that three months notice is sufficient under a special custom: after so great an authority it is too much for me, sitting at *Nisi Prius*, to say that under a special

special custom twelve months notice is not necessary. But there ought to be very strong evidence, and the witness must not speak to opinion, but facts.

The Defendant failing in his proof the lessor of Plaintiff had a verdict (a).

(a) *Vide* Mr. Justice *Wilmot's* argument, 3 *Burr.* 1609, and *Roe dem. Brown v. Wilkinson, Butl. Co. Lit.* 270 b. note 1.

### SLACK v. BUCHANNAN.

THIS was an action for goods sold and delivered. What admissions may be given in evidence.  
A witness was called, who had been an arbitrator between the parties, to prove the admissions which had been made by the Defendant when the cause was under reference. The reference had proved ineffective.

The Defendant's counsel objected to this evidence, alledging that these admissions were made by the Defendant in hopes of purchasing peace, and therefore ought not to be given in evidence against him.

LORD KENYON. Hitherto I have made it a rule never to receive any admissions whatever, which were made \* on a reference that was not effective. [ \* 6 ]  
I think I have carried that rule too far, and I now wish it to be understood, that for the future I shall receive evidence of all admissions, such as the

the Defendant would be obliged to make in his answer to a bill in equity, and will reject none but such as are merely concessions for the purpose of making peace, and getting rid of a suit. These I think ought not to be admitted in evidence to prejudice the Defendant, when the object for which they were made is at an end (*a*).

(*a*) *Vide Bull. N. P.* [236] accord. *Harman v. Van Hatton*, 2 *Vern.* 717. 1 *P. W.* 497. *Waldredge v. Kenneson*, 1 *Esp. N. P. Cas.* 143.

### CHARRINGTON *v.* MILNER.

In an action against the maker of a promissory note the indorser is a good witness to prove it paid. *S. P. Cooper v. Dacres*, 1 *Esp.* 403.

*ASSUMPSIT* against the maker of a promissory note, at the suit of the indorsee.

The note was indorsed by one *Monk* to the Plaintiff. The Defendant called *Monk* to prove that he had paid the money for which this note was indorsed to the Plaintiff.

This was objected to on the ground that a man shall not be permitted to invalidate his own security.

Lord KENYON at first doubted whether he could be examined or not, but afterwards said that this evidence not proving the note *originally* void, he was clearly a competent witness. Wherefore he was examined (*a*).

(*a*) See the cases cited in the note in page 118, which shew that no such distinction is now made; but that the witness is equally

equally admissible to shew that the note was originally void, as he is to shew that it has been since satisfied; and as his evidence will not avail him in an action brought against himself, but some other person must then be called to prove the fact of payment, he is not liable to objection on account of interest. So if he had received money from the drawer to take it up, he would equally be a witness to prove the payment. See *Birt v. Kershaw*, 2 *East*. 458. Recognized by *Grant*, M. R. in *Paul v. —*, administrator of *Hamilton*. *Schw. N. P.* 356. So in an action by the indorsee against the acceptor of a bill, the drawer may prove payment by himself, *Humphrey v. Moxon*, *post*, 52. So in an action by the payee against the acceptor, the drawer is admissible to prove that the bill has been discharged by an executed agreement, *Pool v. Bousfield*, 1 *Camp*. 55. The payee of an accommodation bill is a good witness to prove that he received a valuable consideration from the indorsee in an action by the latter against the drawee; the interest being equal either way, *Shuttleworth v. Stephens*, 1 *Camp*. 407. And in such an action the acceptor, to excuse want of notice of dishonour to defendant, may prove that he had no effects in witness's hands, *Staples v. Okines*, 1 *Esp*. 332. But in *Buckland v. Tankard*, 5 *T. R.* 578. which was an action by the indorsee of a bill against the acceptor, the Court of *K. B.* held, that the indorsee could not be called as a witness to prove that the Plaintiff had no right to recover upon the bill, on account of his having merely received it from the indorsee in trust to obtain payment of it from the acceptor for the use of the witness. But this case is much shaken by the decisions in *Birt v. Kershaw*, *ut sup.* and *Ilderton v. Atkinson*, 7 *T. R.* 481.

# CASES IN K. B.

AT THE SITTINGS

AT NISI PRIUS,

AFTER TRINITY TERM, 30 GEORGE III. 1790.

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*Saturday,  
June 26th,  
1790. At  
Westminster.*

BARTELOT v. HAWKER, Esq.

A husband separated from his wife cannot maintain an action for criminal conversation after the separation.

THIS was an action of trespass for criminal conversation with the Plaintiff's wife.

At the time the adultery was committed the Plaintiff and his wife were separated by articles made on account of quarrels which had previously taken place between them. These articles were dated 31st *May*, 1786.

Lord KENYON said, that if the parties were separated by mutual consent, at the time, he was of opinion that the husband could not maintain this action, for it was impossible he could receive any injury by losing the society of a wife, whom he had already abandoned.

[ \* 8 ]

\* *Erskine*, for the Plaintiff, said he believed that he should be able to prove a criminal conversation, or at least a seduction of the wife's affections by the  
the

the Defendant before the separation: but if he should not, he requested his Lordship to save the point for the opinion of the Court, which his Lordship agreed to do.

The Plaintiff proved a criminal conversation before the separation, upon which the Jury gave a verdict for the Plaintiff, damages £700 (a).

(a) *Vide Hodges v. Windham*, post, 39. *Weeden v. Timbrel*, 5 T. Rep. 357. accord. But in *Chambers v. Caulfield*, 6 East. 244, the doctrine of these cases was considerably shaken, there the husband and wife having entered into a deed of separation, by which trustees were appointed, and the wife, during the time of the adulterous intercourse, living absent from her husband, though not pursuant to the terms of the deed, (the trustees not having given their approbation to her departure;) the court held that she could not be considered as absent with the consent of the husband, and therefore that the case did not fall within that of *Weeden* and *Timbrel* (the only one cited) but Lord *Ellenborough* added, that he did not consider the question, "whether the mere fact of a separation between husband and wife by deed, was such an absolute renunciation of his marital rights as precluded the husband from maintaining an action for the seduction of his wife," as concluded by that case.

The



Thursday,  
July 1st. At  
Westminster.

The KING v. RICHARD HAWKINS.

Where to an information in the Exchequer for having goods knowing them to have been run, the Defendant pleads *not guilty*, such plea only puts in issue the fact of Defendant's possession and knowledge, and if in stating the record, it is said, that the issue was touching and concerning the forfeiture of the goods, it is a fatal variance.

THIS was an indictment for perjury alledged to have been committed on the trial of an information in the Exchequer.

The indictment stated, that “ at the Sitting of *Nisi Prius* held &c. before the Right Honourable Sir *James Eyre*, Knight, Chief Baron &c. a certain issue before then duly joined, in a certain information before then exhibited by Sir *Archibald Macdonald*, Knight, Attorney General of our said Lord the King, who prosecuted, &c. between the said Attorney General, on behalf &c. and one *Luke Staveley* (the prosecutor of this indictment) *touching and concerning the forfeiture of certain goods and merchandizes imported from parts beyond the seas to Great Britain* by way of merchandize and unshipped to be laid on land before the customs and other duties \* due to his Majesty for the same goods were first paid and secured, *contra formam statuti*, and also touching and concerning the forfeiture of the treble value of the same goods by the said *Luke Staveley*, for harbouring, keeping, concealing and having possession of the same, knowing they were run goods, &c. came on to be tried, &c.”

The information in the Exchequer was read. It stated, that “ certain merchants unknown did import, or cause &c. from parts beyond the seas into

“ into *Great Britain*, to wit at, &c. within the  
“ port of *London*, in a certain ship or vessel like-  
“ wise unknown, by way of merchandize, two  
“ bales of *Bandannoa* handkerchiefs, of the value  
“ &c. liable at the time of the importation thereof  
“ to the payment of customs and other duties;  
“ that they did afterwards unship them to be laid  
“ on land, before the customs &c. were paid &c.  
“ by reason whereof they became forfeited, and  
“ being so forfeited, they came to the hands and  
“ possession of the said *L. S.* he at the said time  
“ well knowing that they were imported and un-  
“ shipped &c. by reason whereof *he forfeited the*  
“ *said goods and merchandizes*, and £360. the  
“ treble value thereof.” There was a second count  
generally stating “ that the goods had been run  
“ into *Great Britain* &c. by reason whereof they  
“ became forfeited, and that the Defendant did  
“ knowingly conceal them &c. whereby he for-  
“ feited £360. the treble value of the said goods.”  
The prosecutor of this indictment had pleaded  
generally “ not guilty” to that information, and  
upon the trial a verdict was found against him for  
the penalty.

\* *Erskine*, for the Defendant in this indictment, [ \* 10 ]  
objected that the issue on the information was not  
truly stated in this record, for that the plea of not  
guilty did not put in issue the fact of the goods  
being brought over by persons and in ships un-  
known, but only the Defendant’s knowledge of  
their having been run. To recover the goods  
themselves on account of a forfeiture, the pro-  
ceedings must be *in rem*.

*Mingay*,

*Mingay*, for the prosecution, answered, that the issue was truly stated, because in order to recover a verdict on that information, the Attorney General must have proved that the goods were forfeited, as well as the Defendant's possession of them and knowledge of their being smuggled.

BULLER J. (a). Though the Attorney General might, as Mr. *Mingay* observes, be obliged to prove the first part of the charge, either by witnesses, or a judgment on a prior information *in rem*, yet it does not follow that that was the matter in issue. It was only inducement. The only question put *in issue* by the plea of not guilty was, whether the Defendant had the goods in his custody knowing that they were smuggled into *England*.

His Lordship therefore directed an acquittal, which was found without entering into the merits.

(a) Mr. J. BULLER sat to-day for Lord KENYON.

[ \* 11 ]

\* The KING v. TAYLOR.

Same day.

The proper question to be asked a witness in order to ground an objection to his competency, is not whether he believes in *Jesus Christ* or the Holy Gospels, but whether he believes in *God* and a future state.

THE Defendant was indicted for conspiring with one *Peperel* and *Humphrey Tristram Potter* deceased, to ruin the credit of the prosecutors Messrs. *Parker*, (who were considerable glass warehousemen)

men) and in prosecution of such conspiracy, publishing a libel in the newspaper called the *Morning Star*, purporting to be an advertisement for calling together the creditors of the said *Parkers*. The indictment contained a second count for publishing the libel.

The prosecutors called a witness of the name of *Smith*. Before he was examined, *Mingay* the Defendant's counsel, asked him whether he believed in *Jesus Christ*? But, on *Erskine*, for the prosecutor, objecting to the question, *Buller J.* overruled it, saying it should not be put.

*Mingay* then asked the witness, whether he believed in the *Holy Gospels of God*, on which he had been sworn? He answered, he believed them, as far as he could understand them.

*Mingay* insisted this was no answer to his question, and was proceeding in his examination, when

*BULLER J.* said, that this was not the proper question, and asked him whether he believed in *God*, the obligation of an oath, and a future state of rewards and punishments? and on his answering in the affirmative he was admitted.

Several persons were called to affect the character of this witness, and swore that, from what they observed of his conversation and manners, they would not believe him on his oath—And the Jury, not believing his testimony, found the Defendant not guilty.

The

[ \* 12 ]

*Saturday,  
July 3. At  
Westminster.*

\* The KING v. DALBY.

The person who has been charged with a sum of money by the perjury of the *only witness* examined, and has filed a bill for relief, is not a competent witness on an indictment for that perjury, though he has since paid the money. *Res v. Boston, 4 East. 572. contra.*

THIS was an indictment against the Defendant for perjury alledged to have been committed on the trial of an action brought by *Abraham Greenwood* against the prosecutor for usury; in which action a verdict was obtained against the prosecutor on the evidence of the Defendant, *who was the only witness*. The first witness called was *Priestman* the prosecutor.

*Law*, for the Defendant, objected to him as an incompetent witness on account of his interest. He had filed a bill in the Court of Chancery against the Defendant and *Greenwood*, stating the perjury and that the verdict was obtained on that perjury, and praying an injunction. He said this case was similar to that of *The King v. Menetone* at the Sittings after Trinity Term 1785. That was an indictment for perjury committed in an answer in Chancery to an injunction bill filed by the prosecutor. *Mr. J. Buller*, who tried that cause, thought that the prosecutor was an incompetent witness, because by convicting the Defendant of perjury, the witness would certainly obtain a perpetual injunction.

*Erskine* said, he was counsel for the Defendant in that case, and perfectly recollected it. This case, he said, materially differed from it, for to this bill the Defendant had demurred; and, as to him, the bill was dismissed with costs, and since that

that time *the money had been paid* by the prosecutor.

Lord KENYON. This witness is certainly not competent to give evidence in this cause; as he is clearly \* interested in and may derive a benefit [ \* 13 ] from the event of it, for should this Defendant be convicted, he being the only witness to support the verdict, the Court of *Chancery*, upon having this new matter stated in a new or supplemental bill, would order the money to be refunded.

He was therefore rejected, and the prosecutor not having an office copy of the proceedings in the former cause the Defendant was acquitted (a).

(a) The cases on this point are very contradictory. In *Watt's case*, *Hardr.* 331. it is laid down as a general rule, that in the case of perjury he who is injured by the perjury cannot be a witness; and in the case of *The King v. Whiting*, 1 *Salk.* 283. it was held that a woman who had been induced by the fraud of the Defendant to sign a note of hand, could not be a witness against him, *because* his conviction would influence the Jury on the trial of an action on the note, *though the record could not be given in evidence*. In the case of *The King v. Ellis*, 2 *Stra.* 1104. a Defendant in an ejectment was held not to be a witness on an indictment for perjury committed on the trial of such ejectment: and in the case of *The King v. Nunez*, 2 *Stra.* 1043. it was determined, that a person who had filed an injunction bill in the Exchequer to stay proceedings in an action brought on a promissory note could not be a witness to prove perjury committed in an answer to that bill. *Paris's case*, (1 *Ventr.* 49. and 1 *Sid.* 431.) is directly contrary to *The King v. Whiting*; the only difference between the two cases is, that one information was for fraudulently procuring a warrant of attorney to confess judgment, the other for so procuring a promissory note. And in *The King v. Moise*, (1 *Stra.* 595.) which was an indictment for tearing a note, the payee of the note was admitted to

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prove

[ \* 14 ]

prove the case. The case of *The King v. Whiting* was doubted by Lord Hardwick in *The King v. Bray*, *Cas. temp. Hardw.* 358. and it, together with the cases of *The King v. Nunez*, and *The King v. Ellis*, are said by Lord Mansfield, in 4 Burr. 2255. to have been over-ruled by Lord Ch. J. Lee in the case of *The King v. Broughton*, 2 Stra. 1229. and the rule laid down by Lord Mansfield in that book is, "that the question in a criminal prosecution being the same with a civil cause in \* which the witness is interested, goes generally to the credit: unless the judgment in the prosecution, where he is a witness, can be given in evidence in the cause where he is interested." A distinction however may be made between the cases of *The King v. Whiting* &c. and the case of *The King v. Broughton*. In the first three cases the person who was called as a witness might have eventually been benefited, because in *The King* against *Whiting* the note was a good instrument till the Defendant was convicted. In *The King v. Ellis*, for aught that appears to the contrary, the Defendant in the ejectment failed at the trial, and he might hope to obtain a verdict in another ejectment if he succeeded in convicting the Defendant on the indictment for perjury, and in *The King v. Nunez* the suit in the Exchequer was still pending. In the case of *The King v. Broughton* the suit in Chancery was ended, and ended in the manner most agreeable to the interest of the witness, for the Chancellor not believing *Broughton* the Defendant in that indictment, had decreed for the witness, so that the witness could not have even the hope of benefiting himself by convicting *Broughton*. The case of *The King v. D'Faria*, *post* 104. is open to the same observation, and the following case clearly establishes the position laid down by Lord Mansfield in the case of *Abrahams* and *Bunn*. This however clearly overturns the case of *The King v. Whiting*, and cannot be distinguished from it. It was the case of *Bartlett v. Pickersgill*, and is cited by Lord Mansfield, 4 Burr. 2255. as follows: The Defendant bought an estate for the Plaintiff. There was no writing, nor was any part of the money paid by the Plaintiff. The Defendant articulated in his own name and refused to convey, and by his answer denied any trust. Parol evidence was rejected. And the bill was dismissed. The Defendant was afterwards indicted for perjury, tried

tried at *York*, and convicted, *on the evidence of the Plaintiff*, confirmed by circumstances and the Defendant's declarations. The Plaintiff then petitioned for a supplemental bill in the nature of a bill of review, stating the conviction. But the petition was dismissed *because the conviction was not evidence*. So in the case of *Smith and Prager*, 7 *T. Rep.* 60. the borrower of money was held a good witness to prove the whole case in an action for usury against the lender, and the authority of *Abrams v. Bunn* fully recognized. The last case on the subject was that of *The King* against *Boston*, 4 *East.* 572. where the Defendant having been convicted of perjury in an answer to an injunction bill, and the Plaintiff in the bill and his wife having (after objection) been examined as witnesses on the trial, the Court of *King's Bench* decided that they were competent witnesses; because in no case where a person has been examined on the trial of an indictment can the verdict on that indictment be used for him. See also the case of *Smith v. Rummins*, *Campb. N. P.* 11. where a conviction obtained on the evidence of a person who was afterwards made Defendant in a cause, was on the authority of that case, determined by Lord *Ellenborough* not to be admissible evidence for him. So in *Hathaway v. Brown*, 1 *Campb.* 151. where *B.* and *C.* had been convicted of a conspiracy on the prosecution of *A.*, Sir *J. Mansfield*, C. J. held the conviction not admissible in evidence in an action afterwards brought against them by *A.* for the same conspiracy, as the conviction might have proceeded in part on the testimony of *A.*; who, if it were admitted, would in effect be swearing in his own cause. And *vide Burdon v. Browning*, 1 *Taunt.* 520.



# C A S E S I N K. B.

AT THE SITTINGS

AT NISI PRIUS,

AFTER MICHAELMAS TERM, 31 GEO. III. 1790.

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*Friday, December 3d, 1790. At Westminster.*

MIDDLETON *v.* BREWER.

A promise to pay the debt of another need not be proved to be in writing when the Defendant pleads a tender to the count on such promise.

*ASSUMPSIT.* The declaration stated, that the Defendant's son being indebted to the Plaintiff in a large sum of money, in consideration of the Plaintiff's forbearing to sue him for the same, Defendant promised to pay.

The Defendant pleaded the general issue to part, and a tender of the residue. The question was, whether the Plaintiff was obliged to prove an undertaking in writing.

Lord KENYON was clearly of opinion that he was not. By paying the money into Court on the plea of tender the Defendant had admitted the promise; this was not as if there had been several counts, and the \* Defendant had pleaded the tender and paid the money into Court on some counts

counts only; he had applied this tender to this count, and therefore the plaintiff was not obliged to prove the promise (a).

It appearing that more than sufficient to satisfy all just demands of the Plaintiff had been tendered, the Jury found a verdict for the Defendant.

(a) See 1 *Williams, Saund.* 33. c. and cases there collected. So where in an action for the rent of tithes the Plaintiff averred that he had agreed to let the tithes to the Defendant, and in pursuance of that agreement had permitted him to take them, and the Defendant pleaded a tender on all the counts generally; the court of C. P. held, that he was thereby precluded from shewing a legal interruption to his taking the tithes, *Cor v. Brain*, 3 *Taunt.* 95. So payment of money into court is an admission of the contract stated in the declaration. Therefore in an action on a bill of exchange, where the Defendant paid money into court on the whole declaration, the court held that by so doing he had admitted the bill, *Gutteridge v. Smith*, 2 *H. Black.* 374. Nor can the Defendant after such payment object to the insufficiency of the stamp, *Israel v. Benjamin*, 3 *Campb.* 40. *K. B. M. T.* 1808. So in an action of covenant, such payment renders it unnecessary to prove the deed, *Randall v. Lynch*, 2 *Campb.* 857. *Watkins v. Towers*, 2 *T. R.* 275. And such payment is an admission of the existence of a contract in every transaction which is capable of being converted into a contract by the assent of the parties. Therefore, where a Defendant who had possessed himself of goods belonging to the Plaintiff, and had sold part, and kept the residue in specie, paid money into court generally upon a declaration containing a count for goods sold and delivered, it was held, that he had thereby admitted the transaction to have been converted into a contract, and that the Plaintiff was entitled to recover the value of all the goods under the count for goods sold and delivered, *Burnett v. Francis*, 4 *Esp.* 28. 2 *Bos. and Pul.* 550. *Vide Burrough v. Skein*, 5 *Burr.* 2640. So where Plaintiff declared for work and labour as a surgeon, payment of money into court admits his right to sue as such; *Lipscombe v. Holmes*, 2 *Camp.* 440. and when paid into a superior

a superior court is a conclusive admission of Plaintiff's right to sue in such court, *Miller v. Williams*, 5 *Esp.* 19., but does not preclude the defendant from availing himself of his infancy, *Hitchcock v. Tyson*, 2 *Esp.* 482. n. Payment of money upon some of the counts is an admission of the cause of action on those counts only, *Baillie v. Cazalet*, 4 *T. R.* 579. and of a legal demand only, *Ribbans v. Crickett*, 2 *B. and P.* 269.; so that in an action for two demands, the Plaintiff cannot apply such payment to the illegal, and recover for the legal demand, *ibid.* Payment of money is only an admission of the contract, and does not preclude the Defendant from disputing his liability ultra such payment, by objecting in an action on a policy of insurance either that the name of the party interested is not inserted in the policy, *Cox v. Parry*, 1 *T. R.* 464. or that the goods were not loaded according to the terms of the policy, *Mellish v. Allnutt*, 2 *M. and S.* 106. But he cannot shew that the policy was originally different, and was altered by the broker without his knowledge, *Andrews v. Palgrave*, 9 *East.* 325. So in an action on a valued policy such payment upon a count, stating a total loss by capture, is no admission of a total loss; but the Plaintiff is bound to prove that he suffered damage from the capture beyond the amount of the sum paid into court, *Rucker v. Palgrave*, 1 *Camp.* 557. 1 *Taunt.* 419. So in an action for goods sold and delivered, the Plaintiff must prove that the goods ultra the payment were his property, although before the money was paid into court a particular was delivered to Defendant, stating that the action was brought for a lot of goods sold for the Plaintiff to Defendant by Plaintiff's broker, *Blackburn v. Scholes*, 2 *Camp.* 341. And where in an action against a carrier for not safely carrying goods, he paid 5*l.* into court, it was determined that by so doing he had admitted the contract for the safe carriage and the loss, but that he was still at liberty to shew that he was not liable beyond the sum paid into court, by proving a notice, "That no more than 5*l.* would be accounted for, for any goods or parcels, unless entered as such and paid for accordingly," *Clark v. Gray*, 6 *East.* 564. In a former case it had been determined, that by the payment of money into court the Defendant had admitted the contract to the extent of being liable for the whole loss, and could not avail himself of a notice conceived in terms nearly similar. *Vide*  
Yate

*Yate v. Willan*, 2 East. 128. Where the Plaintiff, previous to the trial, has induced the Defendant to believe that the only point to be tried would be a question of fraud, and has suffered him to prepare his evidence for that purpose, the court will not allow the Plaintiff to object to the receipt of that evidence on the ground of the contract being admitted by the payment of money into court, *Mullen v. Hartshorne*, 3 Bos. and P. 556.

### THWAITES v. RICHARDSON.

THIS was an action for money paid, laid out, and expended, &c.

The Defendant was one of the proprietors of a public newspaper called the *Morning Star*. The Plaintiff had expended several sums of money in paying the workmen employed in printing the paper, &c.

In an action of *Assumpsit* against one partner, evidence may be given of the admission of another. *Comme semble.*

After proving the Defendant a partner in the paper, the Plaintiff offered to give evidence of the admission of another partner that the money was owing to the Plaintiff.

On this evidence being objected to, Lord KENYON said he thought that though in cases where an action is brought against several partners, the admission of any one might be given in evidence to prove all liable, yet when one only was sued, the admission of the other could not be given in evidence to charge him.

It was then proposed to release the other partner  
and

[ \* 17 ] and call him, but the Plaintiff's counsel recollecting that by so doing they would discharge both, did not call him; and upon *Garroa*, for the Plaintiff, observing \* that there was a case (a) in one of the books, where it had been held that the admission of one joint maker of a promissory note might be given in evidence to take it out of the Statute of Limitations in an action brought against the other alone.

Lord KENYON said, he would receive the evidence with liberty for the Defendant to move the Court upon the question as to its admissibility (b).

The parties afterwards agreed to a reference.

(a) *Whitcomb v. Whiting*, Dougl. 652. See also *Jackson v. Fairbank*, 2 H. Bl. 340. where it was held that proof under a commission of bankrupt against one joint and several maker of a note was an answer to the Statute of Limitations in an action against the other. But this latter case may be considered as over-ruled in *Brandram v. Wharton*, 1 Burnw. and A. 463.

(b) A similar admission was received in evidence by Lord Ellenborough in *Nicholls v. Dowding*, 1 Stark. 81. And in *Wood v. Braddick*, 1 Taunt. 104. the Court of C. P. held that an admission made by one of two partners after the dissolution of the partnership, concerning joint contracts that took place during the partnership, was competent evidence to charge the other partner. So in an action against one of several members of a co-partnership society, the entries in a book, containing a record of the proceedings of the society, produced at the meetings, and open to the inspection of all the members, are admissible in evidence against the Defendant after he has been proved to be a member of the society, *Alderson v. Clay*, 1 Stark. 405. Lord Ellenborough C. J. But where A. and B. were partners, and also part owners of a vessel, Lord Ellenborough held, that an admission by A. concerning the part ownership merely was not admissible against B. *Jaggers v. Binnings*, 1 Stark. 64. Vide *Grant v. Jackson*, post, 203. *Hudson v. Robinson*, 475.

GANER

## GANER v. Lady LANESBOROUGH.

Monday,  
Dec. 6.**D**EBT on judgment.

The Defendant pleaded in abatement that she was covert of *John King*, and the Plaintiff, by his replication, traversed that plea. The Defendant proved her marriage to *King*; in answer to which the Plaintiff proved the marriage of *King* with a former wife, and that she was still living. This evidence was objected to as incompetent for the Plaintiff to give on this replication, which only traversed the marriage of *King* with the Defendant. But Lord *Kenyon* admitted it, saying, it proved that there was no marriage at all between the Defendant and *King*, he being unable to contract marriage with her.

On a replication that *A.* was not married to *B.* proof that *A.* was married to another woman then alive, and therefore that he was incapable of contracting marriage, will maintain the issue.

The Defendant then offered to prove that *King* being a Jew and his former wife a Jewess, they were divorced at *Leghorn*, according to the rites and customs of the Jews there, and that after such divorce it was competent to either party to marry again.

[ \* 18 ]

\* To prove this she produced an instrument under the seal of the Synagogue there, whereby they were divorced from each other. But Lord *Kenyon* held this to be no evidence, for before he could take notice of any proceeding in a foreign court, he must know the law of the country, which

The English Courts cannot take notice of any judicial act done in a foreign country, without evidence of the laws of such country.  
was

was matter of evidence, and should be proved by witnesses (a).

A Jewess may be permitted to give parol evidence of her own divorce in a foreign country according to the custom of the Jews there.

The Defendant then called *King's* former wife to prove the divorce. She was objected to as an incompetent witness, but the objection being overruled, she swore (without producing any instrument), that she was divorced from *King* before the *Rabbi*, at *Leghorn*, according to the ceremony and custom of the Jews there.

On this evidence the Defendant had a verdict.

(a) *Vide* 1 P. W. 431. accord. "And such laws, if in writing, must be proved by a copy properly authenticated," *Clegg v. Levy*, 3 Camp. 167. per L. Ellenborough C. J. *Millar v. Heinrick*, 4 Camp. 155. per Gibbs C. J. In *Boehtlinck v. Schneider*, 1 Esp. 58. it is stated to have been held by Lord Kenyon, and confirmed in *K. B.* that the *unwritten* law of a foreign country can only be proved by documents properly authenticated. But in *Millar v. Heinrick*, *ut sup.* L. C. J. Gibbs says, "foreign laws, not written, are to be proved by the parol examination of witnesses of competent skill. But where they are in writing, a copy, properly authenticated, must be produced." *Vide Buchanan v. Rucker*, 1 Camp. 63. and *Richardson v. Anderson* there cited.

Wednesday,  
Dec. 10.

## POLLARD v. SCOTT.

It is no objection to the competency of a witness

**TRESPASS.** Justification, the *locus in quo* being a highway.

A witness who comes to prove a highway, that he is the owner of an adjoining piece of land, and has let a road to A. at a certain sum of money *per annum*, which he cannot use unless the road in dispute be established.

A witness was called on behalf of the Defendant to prove his plea. He was asked, on the *voir dire*, whether he was not the owner of a field adjoining the *locus in quo*, and had not agreed with the Defendant to let him pass across that field at all times, he paying £6. a year for that privilege. He answered in the affirmative; and it appeared that the Defendant could not get to the road assigned by the witness, if the *locus in quo* were not a public road.

\* *Erskine* contended that this was such an interest in the event of the suit as rendered him an incompetent witness, but Lord *Kenyon* over-ruled the objection, and he was examined. [ \* 19 ]

A copper-plate map was produced, wherein this close was described as a public road; and the Plaintiff offered evidence to prove that it was generally received in the parish as an authentic map. It purported on the face of it to be taken by the direction of the churchwardens of that time.

Lord KENYON refused to receive this evidence, saying, that it would be equally improper to admit it as to admit a plan taken by the lord of a manor, who might thereby crush and destroy the estates of his tenants (a).

(a) *Vide Sir John Bridgman v. Jennings*, 1 Lord Raym. 734. *Peake, L. Evid.* [89,] 91. 1 *Str.* 95. and note there.



## KOOPEs v. CHAPMAN and Another.

A creditor is a witness to prove an act of bankruptcy if he releases to the assignees.

THIS was an action of trover. A commission of bankrupt had issued against the Plaintiff, and the Defendants had seized the goods thereunder.

The Defendants admitted that they had seized the goods, and to prove that the Plaintiff had committed an act of bankruptcy *they* called a creditor who had released to the assignees.

*Mingay*, for the Plaintiff, objected that this release would not make him a competent witness. At present it did not appear that the assignees had any interest in the estate of the Plaintiff, and therefore they could not take a release.

[ \* 20 ]

\* Lord KENYON. This makes him a good witness to prove the bankruptcy. If the commission is established, the release stands good ; if not, the Plaintiff is not released, nor has it any operation (*a*).

(*a*) *Vide Ambrose v. Clendon, Cas. temp. Hardw. 267.* accord. So a creditor, who has sold his chance of recovering his debt, is a good witness to prove the petitioning creditor's debt, *Granger v. Furlong, 2 Black. 1373.* or to increase the fund out of which the debt is to be paid, *Heath v. Hall, 4 Taunt. 326.* In *Williams v. Stevens, 2 Camp. 301.* Lord Ellenborough held, that a creditor who has not proved his debt under the commission, is a competent witness to support it, though not to increase the estate. But this case being cited before Lord Eldon, his Lordship said, " It is not enough that the creditor has not availed himself of the commission ; to make him a competent witness it ought to be certain that he never will." *Ex parte Osborne, 1 Rose, 387.* And in *Adams v. Malkin, 3 Camp. 543.* Lord C. J. Gibbs rejected a witness who came

came to support a commission, although he did not appear to have proved. But though a creditor cannot be admitted to support a commission, yet even the petitioning creditor is a competent witness to defeat a commission, *Green v. Jones*, 2 *Camp*, 411. *Lloyd v. Strellon*, 1 *Stark*. 40. or to cut down his own debt, *ibid*.

## MACFERSON v. THOYTES.

Friday, Dec.  
12. At  
Guildhall.

*ASSUMPSIT* on a bill of exchange, indorsee against acceptor, the bill was drawn by one *Parry* payable to his own order, and the name of *Parry* was indorsed on it.

Comparison of hands is not evidence in civil any more than in criminal cases (s).

The Plaintiff proved the hand-writing of all the indorsers except the first.

The Defendant's counsel insisted that this should also be proved.

It was answered, that the acceptance was an admission of the hand-writing of the drawer; and that by comparing that hand-writing with the *indorsement*, they would be found to correspond.

Lord KENYON. Comparison of hands is no evidence. If it were so, the situation of a Jury who could neither write nor read would be a strange one, for it is impossible for such a Jury to compare the hand-writing.

The

(a) But in cases of forgery a *literate* Jury may compare the forged instrument with other papers in the Defendant's hand-writing,

The Plaintiff was therefore called (a).

*Vide Strange v. Searle, Espinasse 14, accord'.*

writing, *Allesbrook v. Roach*, *Sittings at Westminster after Trin. Term. 1795*, M. S. *Vide Peake Law Evid.* [104]. 107.

(a) *BROOKBARD v. WOODLEY* clerk, *Coram Yates, Just. at Worcester Spring Assizes, 1770.*

[ \* 21 ]

In prohibition, the Plaintiff in support of a *modus*, produced in evidence a paper said to be under the hand of the deceased \* Rector, being a particular of tithes, &c. In order to shew that this was the writing of the deceased Rector whose name it bore, the Plaintiff's counsel offered to produce many of the returns to the Spiritual Courts of births and burials made in the time of that Rector, and signed with his name; and upon comparing this entry with those returns, it was said it would appear, that the hand-writing was the same. The Rector had been dead many years.

YATES J. I have no doubt to reject this evidence as not admissible, I do not know any case where comparison of hands has been allowed to be evidence at all. No trial can be decided by opinion and speculation, but by evidence. Where a witness has seen the party write, and speaks to his belief of that writing which is produced in evidence being the party's hand-writing, that is evidence. But where it is merely opinion on similitude of the writing collected from barely comparing them, the Jury may compare them as well as any body else, and any two people may think differently. In an indictment for forgery, the evidence of a person who has seen the party write is sufficient. The case now in question is not like a rental, terrier, old title deeds; these are received without evidence of hand-writing, because of the *place* they come from, which gives them authenticity. Suppose some of the Jury cannot read or write, how are they to judge of the similitude of hands? I have no doubt but this evidence must be rejected.

In a case circumstanced like this Lord *Hardwick* permitted a witness, who had examined the parish books, to swear to the similitude of the hand-writing. See *Bul. N. P.* [236.] And in *Rae dca. Brune v. Rawlins, 7 East, 282.* the signature in an entry, purporting

purporting to have been made by a person long since deceased, was allowed to be compared with another signature of the same person in a deed of settlement, and no objection appears to have been made to such mode of proof; and on the cause being sent down for a new trial, the same proof was again admitted by *Le Blanc J.* who said, that at this distance of time no better evidence of the fact than comparison of hands could be obtained, and that he had no doubt it was proper to be received. So in *Morewood v. Wood*, 14 *East*, 327. where a person had been dead a great number of years, whose hand-writing was required to be proved, it was done by shewing the similarity of the hand-writing in question to the hand-writing of his will, and no objection was taken to it either at the Bar or by the Court. And see *Burr v. Harper*, 1 *Holt*, 420.

## EVANS v. SILVERLOCK.

*ASSUMPSIT* for goods sold and delivered.

The Defendant's counsel stated that the Plaintiff and one *Morgan* were in partnership together, and that on a dissolution of that partnership it was agreed between them, that *Evans* should receive some of the debts, and *Morgan* the \* others.

In an action brought by one partner, another may be called to prove the debt paid to him.

[ \* 22 ]

This debt was to be paid to *Morgan*, and the Defendant had accordingly paid it to him. They called *Morgan* to prove this case.

*Bearcroft* objected that he was not a competent witness.

Lord KENYON said, he was, as the judgment in this cause could not conclude his right. He was examined,

examined, and on his evidence the Defendant obtained verdict (a).

(a) Where a co-plaintiff, with his own consent, was called by the Defendant, and examined on his behalf, the Court of C. P. refused to set aside the verdict, *Norden v. Williamson*, 1 Taunt. 378. *Vide Lucas v. De la Cour*, 1 M. and S. 249. *Hudson v. Robinson*, 4 M. and S. 475.

Monday,  
Dec. 13. At  
Guildhall.

### CHARLTER One, &c. v. BARRET.

Words  
spoken at  
different  
times may  
be given in  
evidence on  
one count.

CASE for words spoken of Plaintiff in his profession of an attorney.

There was but one count to which the words applied, and the Plaintiff gave evidence of the same words spoken at different times.

This was objected to by the Defendant's counsel.

Lord KENYON said, that though these words were spoken at different times, they might be given in evidence on this one count to shew the malice of the Defendant (a).

(a) *Vide Mead v. Daubigny*, post, 125, the note on that case, and *Lee v. Huson*, post, 166.

MEE

\* MEE v. REID.

[ \* 23 ]

*ASSUMPSIT* on a bill of exchange.

The Plaintiff's case being proved, the Defendant called a witness, who was a *Scotchman* and a member of the kirk ; he refused to kiss the book, and insisted on holding up his hand.

A member of the kirk of *Scotland* may be sworn without kissing the book.

An objection was made to this mode of administering the oath, and Lord *Kenyon* was at first inclined not to permit him to be sworn in this form, but at length determined to receive his evidence under the sanction of an oath so administered.

Accordingly he held up his right hand and repeated the oath after the crier (*a*).

(*a*) *Vide Leach's Crown Cases*, 348, *Mildronc's case*. *Peake's Law Ev.* [141.] 148.

FASSET and Another v. BROWN.

*Tuesday,*  
*Dec. 14.*

DEBT on a bond entered into by the Defendants as sureties for *George Russell*, clerk to the Plaintiffs.

The Defendant pleaded *non est factum*, and that *Russell* had duly accounted.

The Plaintiffs proved that the Defendant brought

If the name of a fictitious person be put as a subscribing witness to a deed, proof of the party's hand-writing is sufficient.

D

the

the bond to the Plaintiffs' counting-house, subscribed with two names as witnesses to the execution of the bond by him: that on inquiry it appeared that no such persons as those whose names were subscribed as witnesses were in existence.

[ \* 24 ] \* Lord KENYON then said, that the Plaintiff was at liberty to give evidence of the Defendant's hand-writing, and the bond was so proved.

But there being a variance between the date of the bond and the statement of it in the declaration, the Plaintiffs were nonsuited (a).

(a) *Vide Grellier v. Neale and Others, post, 147.*

### SCHOLEY v. WALSBY.

An acknowledgment of having received the acceptance of a bill of exchange is a receipt for money within 23 G. 3. and liable to the stamp duty imposed by that act on such receipt.

*ASSUMPSIT* on a bill of exchange drawn by the Plaintiff on the Defendant, and accepted by him.

The Defendant pleaded a set-off for money paid by him to the Plaintiff's use, money had and received by the Plaintiff for his use, and for money lent by him to the Plaintiff.

In support of his case he offered to read in evidence a paper signed by the Plaintiff written in the following words:—

“ *London, Decem. 22d, 1789. Received of Mr. Walsby, his acceptances for £200, due Feb. 20th and 25th, out of which Mr. Walsby has my acceptance*

“ ceptance for £60, the difference I am to make

“ up by the said time of payment.

“ £ 60 on one for 25th of February.

“ £140 I promise to provide.

“ £200

Wm. Scholey.”

\* This was objected to as no evidence, not being [ \* 25 ] stamped. The Plaintiff’s counsel contended it ought to be stamped either as a receipt or a promissory note for £140 (a).

Lord KENYON was of opinion it ought to have been stamped as a receipt, for if such a paper as this were to be admitted as evidence without a stamp, it would put it in the power of any person to evade the act of parliament in almost every case, by paying in notes or bills.

The Plaintiff produced the bill, which had a receipt on the back of it, as being paid to a person who was at that time the holder of it.

Lord KENYON. *Prima facie* the receipt on the back imports that it was paid by the acceptor (b):  
for a general receipt on the back of a bill of exchange is *prima facie* evidence of its having been paid by the acceptor, and will not of itself be evidence of a payment by the drawer, though it is produced by him.

(a) But see *Manning’s Digest*, App. 1. and in *Williamson v. Bennett*, 2 Camp. 417. Lord *Ellenborough* held, that an instrument acknowledging the receipt of a bill of exchange which had two months to run, and promising to pay the amount with interest, could not be declared upon as a promissory note; being a special undertaking to repay the amount of the bill if honoured at maturity.

(b) But in an action for money lent by a person who had accepted for the accommodation of the drawer, the production of the bill is not even *prima facie* evidence that he paid it, without proof that it has been in circulation since it was accepted: and payment is not to be presumed from the appearance of a receipt indorsed



for aught I know to the contrary the Plaintiff and Defendant may have since settled their accounts, and this bill may have been delivered up on such settlement. It must therefore be explained before I can receive it as evidence of the bill having been paid by the drawer.

The Plaintiff, not having any witness to prove that the bill had been paid by him, was nonsuited (a).

indorsed on the bill, unless the receipt is shewn to be in the handwriting of the Defendant, or some other person entitled to demand payment, *per Lord Ellenborough C. J. Pfel v. Vanbatenburg*, 2 Camp. 439.

(a) In *Smith v. Kelly*, sittings at Westminster after Hilary Term 43 Geo. 3, the Defendant offered in evidence a bill of parcels of the goods delivered, to which was subscribed the following words, viz. "settled by two bills, one at nine, and the "other at twelve months;" and Lord *Ellenborough* held this an acquittance, which could not be evidence until stamped, 4 Esp. 249. S. C. So if a tradesman write "settled" under his bills, and put his initials, he incurs the penalty for giving a receipt without a stamp, *Spawforth qui tam, v. Alexander*, 2 Esp. 621. *Kenyon C. J.* But where a receipt is given on a receipt stamp, such receipt is not invalidated by the addition of matter which requires an agreement stamp, where the matter added does not control or qualify the terms of the receipt, *Grey v. Smith*, 1 Camp. 388. And where indorsements of receipts on a bond had left no blank spaces for receipts of subsequent payments to be written upon, such receipts written upon an unstamped piece of paper annexed to the bond, were allowed by Lord C. J. *Gibbs* to be read in evidence, *Orme v. Young*, 4 Camp. 336. And see *Kambert v. Cohen*, 4 Esp. *Skrine v. Elmore*, 2 Camp. 407.

THORNTON

THORNTON v. The ROYAL EXCHANGE  
ASSURANCE COMPANY.

Wednesday,  
Dec. 15.

THIS was an action of covenant on a policy of assurance on a ship from the *Grenades* to *London*.

\* The ship struck upon the bar, as she was entering *Grenville Bay*, and received an injury thereby, for which the present action was brought.

She was afterwards surveyed and repaired. The Defendants contended she was not sea-worthy; and offered to call Mr. *Mestair*, an eminent ship-builder, to prove that from what appeared on the survey which had been made, but at which he was not present, it was impossible *in his opinion*, that the ship could be sea-worthy when the policy was effected.

A ship-builder may be called as a witness to give his opinion as to the sea-worthiness of a ship, on the facts stated by others.

[ \* 26 ]

*Erskine* for the Plaintiff objected to this evidence. He said that had the persons who made the survey been called, he should object to any question as to their opinion; the objection against this evidence was much stronger; the surveyors are not obliged to state on their survey all the circumstances on which they ground their opinion, and the witness can only judge from what is contained in the survey.

Lord KENYON. This evidence is certainly admissible. Lord *Hardwicke* used often to be assisted by the Brethren of the Trinity House, in causes of this nature.

The

The Defendants not making out their case, the Plaintiff had a verdict (*a*).

(*a*) *Vide Chaurand and Another v. Angerstein*, post, 49. *Beckwith v. Sydebotham*, 1 Camp, 116. acc. *Folkes v. Chad*, cited in *Goodtitle v. Braham*, 4 T. R. 495. *Peake's Law of Ev.* 208.

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[ \* 27 ]      \* ROBERTS and Others Assignees, &c. v.  
TEASDALE.

Though a trader deny himself for the express purpose of becoming a bankrupt, such denial will amount to an act of bankruptcy, if made without the knowledge of, or any previous concert with the petitioning creditor.

**T**ROVER for Cotton.

The Plaintiffs were assignees under a joint commission against *Cook* and *Kilner*, and having proved the trading, act of bankruptcy, &c. Mr. *Crowder*, the Solicitor under the commission, was called to prove the assignment to the Plaintiffs. On his cross examination he said, that there having been two meetings of the bankrupt's creditors, and they being found insolvent; the bankrupt *Kilner* called on him to ask him what was best to be done. He told *Kilner* that the most advisable thing he could do was to commit an act of bankruptcy by denying himself to a creditor, which he accordingly did. He added, that this advice was given without the knowledge of the petitioning creditors, or any desire from them, though they had before desired him to take out a commission.

The Defendant's counsel contended, that this  
was

was such a concerted act of bankruptcy, as would not support a commission.

Lord KENYON. The distinction in these cases is very nice. It does not appear that there was any intention to commit a fraud in this case, either by the bankrupt or the petitioning creditor. In this respect it differs from those cases in which concerted acts of bankruptcy have been held to be fraudulent, and the commission grounded upon them void. Here was a desire to make an equal distribution of the bankrupt's effects, and the advice was the most beneficial which \* could have been given for all parties. His Lordship however added, that he was not entirely free from doubt on the case.

[ \* 28 ]

The Defendant's counsel pursued their cross examination, and Mr. *Crowder* said, that at the meetings, an assignment for the benefit of the creditors was offered, but the creditors insisted on having a commission taken out.

Lord KENYON thought that this circumstance materially altered the case, but wished the Jury to find a verdict for the Plaintiff subject to the opinion of the Court on this point.

The Jury found for the *Defendant*.

In the following term a motion was made for a new trial, and after hearing counsel on both sides, the court made the rule absolute.

On that occasion both Lord *Kenyon* and Mr. *J. Buller* said that they thought the evidence of Mr. *Crowder* did not prove this to have been a concerted act of bankruptcy. His evidence is positive that

that he had no communication with the creditors on that subject. He gave the advice to the bankrupt as a friend to him, and to the creditors in general, and not for the purpose of making a fraudulent bankruptcy. It was an honest advice, and for the benefit of all parties.

GROSE J. The evidence of Mr. Crowder is that this advice was given entirely from himself, without any desire of the creditors, or even their knowledge. It is ridiculous to say that it is a *concerted* act of bankruptcy (a).

(a) It is now clearly settled that a concerted act of bankruptcy cannot be taken advantage of by creditors privy to it, and consequently that a commission sued out on the petition of any such creditor may be overturned, *Hooper v. Smith*, 1 Black. 441. *Cawley v. Hopkins, Co. Bank*. La. 95. *Field v. Bellamy*, Bull. N. P. 39. *Eyre v. Birkbeck*, 2 T. R. 595. *Bamford v. Baron*, *ibid.* *Tappenden v. Burgess*, 4 East, 230. *Stewart v. Richman*, 1 Esp. 108. *Ex parte Edmonson*, 7 Ves. 303. *Ex parte Bourne*, 15 Ves. 145. *Bach v. Gooch*, 4 Camp. 232. 1 Holt, 13. Though the contrary had been ruled by Mr. J. Foster in *Bramley v. Mundee*, Bull. N. P. 39. But if the petitioning creditor was not privy to the act of bankruptcy, it is no objection that the assignees were. *Tappenden v. Burgess*, *ub sup.* *Jackson v. Irving*, 2 Camp. 49. And a creditor who, along with others, had become party to a deed of trust, by which in consideration of the assignment of certain debts due to their debtor for their benefit, they released their debts, was held by Lord Ellenborough not to be precluded from suing out a commission of bankruptcy against the debtor, on its being discovered that he had previously to the execution of the deed committed a secret act of bankruptcy, and his Lordship's opinion was confirmed by the Court of K. B. *Doe dem. Pitcher v. Anderson*, 1 Stark. 262. But in another case where the attorney of D. the petitioning creditor, was also the attorney of the bankrupts, and having concerted with them that they should be denied to D., afterwards went

went with him to each of their houses, where they were respectively denied accordingly. Although *D.* was not privy to such denials, yet inasmuch as the attorney was his agent, as well as the agent of the bankrupts, and accompanied him for the purpose of procuring such denials; Mr. *J. Burrough* held, that such denials were fraudulent acts of bankruptcy, and could not support a commission issued on the petition of *D.* *Prosser v. Smith*, 1 *Holt*, 442.

# C A S E S I N K. B.

AT THE SITTINGS

AT NISI PRIUS,

AFTER HILARY TERM, 31 GEORGE III. 1791.

Thursday,  
Feb. 17<sup>th</sup>,  
1791. At  
Westminster.

SHAW v. WHITEMAN.

In an action of *assumpsit* on an express promise to pay for the maintenance of a bastard child, of which the Defendant was the putative father, it is no defence that he has since discovered that the child was not begotten by him.

*INDEBITATUS assumpsit* for board, &c. found and provided by the Plaintiff for a child at Defendant's request.

The Plaintiff proved that she being delivered of the child for whose maintenance the action was brought, and the Defendant believing the child to be his, agreed that she should provide all necessaries for the child, and that he would pay her 7s. a week. The Defendant continued to pay that money until the month of *August*, 1788, when he refused to pay any further allowance whatever. The Plaintiff had not sworn the child to the Defendant before a magistrate.

The Defendant admitted the case proved by the Plaintiff, but offered to prove that the reason of his refusal to pay the allowance, was that he had discovered that the child was not his, but that one

*Farrer,*

*Farrer*, with whom the Plaintiff had also been connected, was the father of it. His counsel contended, that by proving this fact, they should shew there was no consideration for the promise, and that it was therefore void.

Lord KENYON was of opinion that this evidence could not be received on the present issue. The Jury could not here try who was the father of this child, but must confine themselves to the contract. If the child was not the Defendant's he might relieve himself by applying to a magistrate for an order of filiation. Under this direction the Jury gave a verdict for the Plaintiff.

On *Saturday* the 14th of *May* in the following Term, *Mingay* moved for a new trial, but the Court refused even a rule to shew cause.

# BRETON v. COPE, Executor.

**D**EBT on a bond of the Defendant's grandmother (who was the Plaintiff's mother) conditioned for the payment of £1000 and interest.

Pleas *non est factum*, *solvit ad diem*, and *solvit post diem*.

The Defendant called a broker to prove that he, as the broker of the testatrix, had transferred £20,000 stock to the Plaintiff.

Lord KENYON. This is not admissible evidence,  
to

Parol evidence cannot be given of the transfer of stock, but copies from the books of the Bank must be proved. *Marsh v. Colnet*, 2 Esp. 665. S. P.



to prove the transfer, copies from the books of the Bank should be proved (a).

An instrument executed in the presence of a subscribing witness cannot be proved by any other person, even after it is cancelled.

The Defendant then offered to prove this fact by the production of a deed whereby the Plaintiff assigned the dividends of the stock to the testatrix for her life; the assignment to him was recited in this deed. The subscribing witness was not in court, but the deed having been cancelled, *Erskine*, for the Defendant, contended that any other person might be permitted to prove it as well as the subscribing witness, because all its force and power as a legal instrument was at an end, and it was only produced as evidence of the Plaintiff's admission of a fact.

Lord KENYON was clearly of opinion it could not be read unless proved by the subscribing witness (b).

The Defendant then proved an acknowledgment of the Plaintiff that he had received this money.

A transfer of stock is evidence on a plea of payment to an action on a bond.

*Mingay*, for the Plaintiff, contended that this evidence did not support either of the pleas of

(a) *Vide Dougl.* 572. note 3. 3 *Salk.* 154.

(b) This rule is so strictly adhered to that the party who has executed a deed shall not be permitted to acknowledge it, but it must be proved by the subscribing witness, *Johnson v. Mason*, 1 *Esp.* 89. *R. v. Harringworth*, 4 *M. and S.* 350. In *Pearce v. Hooper*, 3 *Taunt.* 60. the Court of C. P. held, that if a Defendant calls on a Plaintiff to produce on the trial a deed in his custody, to which the Plaintiff is a party, and under which he claims a beneficial estate, it is not necessary that the Defendant should call the attesting witness to prove the due execution of the deed when produced. *Vide Jones v. Brewer*, 4 *Taunt.* 46. *Waring v. Bowles*, *ib.* 132. *Weston v. Faulkner*, 1 *Price*, 303.

payment,

payment, unless it was expressly shewn that the stock was transferred for the purpose of satisfying this debt, but Lord *Kenyon* being clearly of a contrary opinion, the Plaintiff proved that the £20,000 stock was intended by the testatrix as a gift to him.

LORD KENYON. It has been a thousand times decided, that where a debtor gives a legacy to his creditor, it shall be considered as payment of the debt. And the gift of £20,000 stock was surely a good payment of a debt of £1000.

The Defendant had a verdict.

STANDEN *v.* STANDEN and Others (a).

Tuesday, Feb.  
22d. At  
Westminster.

CHARLES Miller, by his will, gave a sum of £200 to *Charles Miller Standen* and *Caroline Elizabeth Standen* (two of the Defendants), to bind them out apprentices. The rest of his fortune he gave and bequeathed "to the legitimate children of "*Charles Standen*," father of the Defendants.

A man who has been in fact married, may be a witness to prove such marriage illegal.

A bill was filed in the Court of *Chancery* by the Defendants against the executors of *Charles Miller's* will; and upon the hearing of the cause the Lord Chancellor directed this issue to try whether the Plaintiff was the lawful issue of *Charles Standen*.

(a) This cause was first tried at the Sittings after *Easter Term* 1789.

The

The Plaintiff called his mother, who proved that she was married to *Charles Standen* the father, on the 4th of *August*, 1755, at the chapel of the *Savoy*. That they cohabited together, and that the Plaintiff was born in that wedlock. That having lived five years together, they parted, and had not cohabited since.

The Plaintiff also proved the register of the marriage, where it was entered, that the marriage was celebrated by banns; but no witness's name appeared. In answer to a question, whether any banns were published, the mother said she had no other knowledge of the fact than having been told so by *Charles Standen* (a).

The Plaintiff also called a witness to prove that he had been told by the clerk (since deceased) that the banns were duly published.

Lord KENYON said that this might be received as evidence of the general reputation, though not of the particular fact.

The Plaintiff then proved some circumstances to corroborate the marriage, such as *Charles Standen* having demanded the first witness as his wife, when her relations kept her from him, &c.

The Plaintiff having closed his case, the Defendants called *Charles Standen* the father.

*Erskine* asked him, whether the marriage cere-

(a) It is not necessary for the party who wishes to establish the marriage to prove the publication of banns, *Rex v. St. Devereaux*, *Burr. S. C.* No. 162. 1 *Black.* 367. *S. C.* See also *Wilkinson v. Payne*, 4 *Term Rep.* 468.

mony was not in fact performed at the *Savoy* chapel; whether they both consented to the celebration of that marriage, and lived together as man and wife in consequence of it; and whether the Plaintiff was not his child by the woman he had so married. He answered in the affirmative. Whereupon *Erskine* objected that having acknowledged that a marriage ceremony had taken place, and that a cohabitation had also taken place under the sanction of it; he ought not to be permitted to prove that the ceremony was a mere farce, contrary to the obligation he had solemnly entered at the altar.

But Lord *Kenyon* thinking the objection did not go to his competency though it would much affect his credit, he was examined (a).

He swore that the banns were not duly published three times. Being asked the reason of their not having been so published, he said that he had been \* told by *Wilkinson*, the clergyman, that a friend of the wife's forbade them the second time they were published.

[ \* 34 ]

On this being objected to, Lord *Kenyon* said it was not admissible as a fact, but as evidence that *Wilkinson* had confessed he had married without banns.

The subsequent marriage of *Charles Standen*

(a) Though a legal witness he comes forward under a load of suspicion, per Lord Chancellor in *Standen v. Edwards*, 1 *Ves. j.* 134. So a reputed wife was held competent to prove she was not married, *Rex v. Bromley*, 6 *T. Rep.* 330. *Rex v. St. Peter*, *Bur. Set. Cas.* 25.

was

was also proved, and that the Defendants were the issue of such second marriage.

The form of words prescribed by the Rubrick for the publication of banns need not be precisely followed, this part of the act of parliament being merely directory.

Lord KENYON. In order to constitute a legal marriage by banns, they must be three times published on three several days. All the directions of the act of parliament (a) need not be complied with, the form prescribed by the act is merely directory, and need not be strictly followed (b). If the substance is followed it is sufficient. If the entry in the register was not truly stated, the clergyman was guilty of felony, and he put himself in a dangerous situation by making such a confession as that stated by the witness *Charles Standen*. His Lordship made some further comments on the evidence of *Charles Standen*, and left the cause to the Jury on the credit they thought proper to give to him.

The Jury found for the Plaintiff.

(a) 26 Geo. 2. c. 33. As to registers of marriage, see 52 G. 3. c. 146.

(b) *Vide Reed v. Passer and Others, post, 231.* and *Nicholson v. Squire, 16 Ves. j. 259.*

LICET and Another, Assignees &c. v. REID,  
Esq. and Another.

Wednesday,  
Feb. 23d. At  
Westminster.

TROVER for goods.

*Loy*, the bankrupt, became acquainted with a woman and cohabited with her as her husband for some time, when they parted: and she being absent from the house in which they lived, he took the goods in question out of it, and conveyed them away. She afterwards indicted him at the Old Bailey for feloniously stealing these goods, and on the trial of that indictment he was acquitted.

But Mr. Justice *Buller* (before whom that indictment was tried) having doubts to whom the goods belonged, ordered them to remain in the hands of the Defendant *Reid*, who was the Justice of peace that had taken the information, till such time as it should be ascertained who was the right owner of them.

This action was brought by *Loy*'s assignees to recover the goods, and they proved a notice to the Defendant a month prior to the suing out the writ, but this action was not commenced within six months after the goods came into his possession.

On an objection being made that the action could not be maintained, Lord *Kenyon* said he did not think any notice necessary in this case. These goods did not come to the Defendant's hands in his character of a magistrate, but as a trustee for

If *A.* be indicted for felony, and the Judge who tries the cause order the Justice before whom the information was laid to retain the goods in his possession, until it appears who is intitled to them, it is not necessary to give such Justice a month's notice previous to commencing an action against him for the conversion of them.

the parties, and therefore the case was not within the statute (a).

The trading not being proved the Plaintiffs were nonsuited.

(a) 24 Geo. 2. c. 44. *Vide Feltham v. Terry*, Bull. N. P. 24. *Irving v. Wilson*, 4 T. Rep. 485. *Greenway v. Hurd*, *ibid.* 533. *Daniel v. Wilson*, 5 T. Rep. 1. *Castle v. Burditt*, 3 T. Rep. 523. *Peake's Evid.* [401]. 431. *Biggs v. Bocklyn*, Bart. 2 H. Black. 114. *Weller v. Toke*, 9 East. 364. *Weston v. Fournier*, 14 East, 491. *Graves v. Arnold*, 3 Camp. 242. *Agar v. Morgan*, 2 Price, 126. *Wright v. Horton*, 1 Holt. 458. *Siringer v. Martyn*, Esq. 6 Esp. 134.

### BISSET v. CALDWELL.

Wearing apparel may be distrained for rent.

TRESPASS for breaking and entering the Plaintiff's house, expelling him therefrom, seizing his goods, &c. The Defendant pleaded the general issue.

The defence was that the Plaintiff had taken lodgings, ready furnished, of the Defendant, at the rent of four guineas *per* week; and rent being in arrear the Defendant distrained the Plaintiff's wearing apparel, which were in the lodgings. The Plaintiff's counsel insisted that these could not be taken as a distress (a).

LORD KENYON. This has long been a *verata questio*, but I think they would now be held to be

(a) *Vide 2 Inst.* 152.

the

the subject of a distress. The same reason does not now exist, as formerly, when *averia carucæ*, &c. could not be taken by the common law, because the things distrained being then taken only as a pledge, it was considered that the person losing those things was rendered incapable of earning money to pay the debt, and unserviceable to the commonwealth (a).

It being proved that the Defendant had expelled the Plaintiff by force from his possession of the rooms, he had a verdict and 1s. damages, but Lord Kenyon said it was so shameful an action that he would certify under the 43d Eliz.

(a) S. C. 1 Esp. 206. n. *Baynes v. Smith*, 1 Esp. 206. S. C. In *Hughes v. Chambers and Others*, 1 Burr. 579. it was held that *averia carucæ* might be distrained for non-payment of a poor rate, and Lord Mansfield gave the same reason as that above given by Lord Kenyon. See also 3 Salk. 136. So in *Simpson v. Harlopp, Willes*, 512. and *Gorton v. Falkner*, 4 T. R. 565. it was held, that implements of trade might be distrained for rent if they were not in actual use at the time, and if there were no other sufficient distress on the premises.

The KING v. JONES.



THIS was an indictment for perjury, committed on the trial of an information in the Exchequer against

A recital that an issue came on to be tried, is supported by

evidence that an information containing several counts to each of which the general issue was pleaded was so tried.



against one *Samuel Samuel*, for importing goods contrary to the revenue laws.

The indictment stated the information, &c. It then stated "that such proceedings were had that *an issue* was in due manner joined, and afterwards on, &c. came on to be tried, and was tried by a Jury of the country, &c." On reading the information it appeared that it contained two counts, and that the Defendant had pleaded the general issue to each count separately.

*Erskine*, for the Defendant, objected that this was not a true recital. The information in the Exchequer is not an information where there is *an issue* joined, but one in which *two issues* are joined.

[ \* 38 ] There \* might be another information in the Exchequer, on the trial of which this perjury was committed. He was sworn to give evidence on the trial of *two issues*.

Lord KENYON. I should have thought the converse of the proposition would have held. Had the indictment stated that the perjury was committed on the trial of two issues when there was but one, it would have been fatal, but I do not think that this is any variance (a).

In an indictment for perjury committed on the trial of a former cause the prosecutor should be prepared to prove the whole of the Defendant's evidence.

The witness who had taken down the Defendant's evidence proved the words on which the

(a) So an indictment for perjury in a cause alleging that the cause was tried at the assizes, before *E. W.* one of the Judges, &c. before whom the perjury of the Defendants was assigned, is proved in substance by the *Nisi Prius* record, which stated in the usual form that the cause was tried before the then *two* Judges of assize, one of whom was *E. W.* *Rex v. Alford*, 14 *East*. 218.

perjury

perjury was assigned, but could not speak to any other part of his evidence.

Lord KENYON. The whole of the Defendant's evidence on the former trial should be proved, for if in one part of his evidence he corrected any mistake he had made in another part of it, it will not be perjury. Courts have gone so far as to determine, that where a mistake has been committed in answer to a bill in Chancery, if the Defendant set it right in a second answer, it will save him from the perils of perjury (a).

His Lordship therefore directed the Defendant to be acquitted (b).

(a) *The King v. Carr*, 1 Sid. 418.

(b) *Post Rex v. Dowlin*, post, 170.

### HODGES, Esq. v. WINDHAM, Esq.

TRESPASS for criminal conversation with the Plaintiff's wife.

The Plaintiff and his wife parted on the 8th of August, 1789, and articles of separation were then executed by them. After which the criminal connexion, which was the subject of this action, took place.

*Bearcroft*, for the Defendant, objected that the action could not be supported.

Lord KENYON said it was a question that he had entertained

In an action for adultery, proof that the husband willingly suffered his wife to live in a state of prostitution goes to bar the action, and not merely to mitigate the damages.

entertained considerable doubts upon, but that he was inclined to suffer the cause to proceed, and take a note of the objection, that it might be brought before the Court.

The Defendant proving that the Plaintiff had, before his separation from his wife, voluntarily permitted other men to have criminal connexions with her, Lord *Kenyon* said it was not to be endured that a man should suffer and encourage his wife to live in a state of prostitution, and then come into a court of justice to ask damages. His having suffered such connexion with other men was equally a bar to the action as if he had permitted the present Defendant to be connected with her, for such a husband could have none of that social affection for his wife, the loss of which is the ground of this action (a). Verdict for the Defendant.

(a) *Vide Smith v. Allison*, Bull. N. P. 27. and *Duberley v. Gunning*, 4 T. Rep. 651. accord. *Schw. N. P. 12*. But if the wife is a prostitute, and the husband is not privy to it, it goes only in mitigation of damages. *Per De Grey C. J.* in *Howard v. Burtonwood*, *Schw. N. P. 12*. In *Wyndham v. Lord Wycombe*, 4 Esp. N. P. Rep. 16. and *Sturt v. Marquis of Blandford*, *ibid.* Lord *Kenyon* held, that if the husband in an open and notorious manner carries on a criminal correspondence with other women, he cannot maintain the action, but in *Bromley v. Wallace*, 4 Esp. 237. Lord *Alvanley* differed from Lord *Kenyon*, and thought the infidelity or misconduct of the husband could never be set up as a legal defence to the adultery of the wife; it went only in mitigation of damages: that alone which struck him as furnishing any defence, was where the husband was accessory to his own dishonour.

PHETHEON

## PHETHEON v. WHITMORE.

Friday,  
Feb. 25. At  
Guildhall.

*ASSUMPSIT* on a bill of exchange drawn by *Rayner* in favour of the Plaintiff, and accepted by the Defendant.

The Defendant offered *Rayner*, the drawer, as a witness to prove that the acceptance was conditional, and that the Defendant was not to pay the bill unless he should receive a sum of money due to *Rayner*. That the Plaintiff knew of this condition, and that the money had never been paid to the Defendant.

*Erskine* contended that he was an admissible witness. On the point of interest no objection could be made to him, for immediately that he defeated this action he made himself liable as drawer, by shewing that this bill was never any satisfaction of the debt owing from him to the Plaintiff. The only remaining objection was against his invalidating his own security. This is not like the case of a man coming to shew that the bill was originally void; this witness will only prove that the subsequent condition on which the payment was to depend was not performed. He mentioned a case of *Gardner v. Carter*, which, he said, was exactly like the present.

BULLER J. (who sat for Lord *Kenyon*) said he thought that this witness was not admissible, as his evidence tended to blow up the bill.

Quere. Whether a party to a negotiable instrument can in any case be admitted as a witness to invalidate it? It is now settled that he may; vide *Jordain v. Lashbrook*, 7 T. Rep. 601. and the note on the case of *Adams v. Lingard*, post, 118.

*Erskine*

[ \* 41 ] *Erskine* said there was a difference of opinion among the Judges on this point; my Lord *Kenyon* had taken \* the distinction between a party to the bill coming to prove it bad in its creation, or avoided on account of some subsequent act (*a*); though some of the other Judges had thought differently.

Upon this Mr. J. *Buller* said he would, to prevent the cause coming to trial a second time, admit the testimony of *Rayner*, subject to the correction of the Court: though at the same time his own opinion was that he was not an admissible witness.

The witness not proving the case opened, the Plaintiff had a verdict (*b*).

(*a*) *Vide Charrington v. Milner, ante, 6.*

(*b*) *Vide 3 T. Rep. 36. Adams v. Lingard, post, 117, and cases there cited.*

### DUNMORE v. TAYLOR.

If *A.* agree to make a waggon for *B.* and make it accordingly, but refuse to deliver it unless the money is paid on delivery, the money which was to be paid for the waggon may be set off to any demand of *B.* against *A.* as goods bargained and sold. *Comme semble.*

*ASSUMPSIT* for goods sold and delivered. Set off for goods sold and delivered, and also for goods bargained and sold.

On the cross examination of the Plaintiff's witness

ness it appeared that the Defendant had made a waggon for the Plaintiff, but had refused to deliver it unless the Plaintiff would get some person to join him in giving a security for the balance which the delivery of the waggon would make in his favour. The Plaintiff was then insolvent.

It was objected that this contract, being only executory, could not be made the subject of a set off.

\* BULLER J. thought it could be set off as goods [ \* 42 ] bargained and sold. When the cause had proceeded further, it appeared that it was afterwards agreed that the Plaintiff should not have the waggon, but that the Defendant should keep it. Upon which the Plaintiff had a verdict.

Note. After the cause was over, Mr. J. Buller said that he thought an *indebitatus assumpsit* would lie in this case, but that there was some nicety in the question (a).

(a) The doctrine of Mr. J. Buller in this case is consistent with what was afterwards determined by Lord Kenyon in the following cases :

HANKEY v. SMITH.

K. B. *Sittings at Guildhall, after Easter T. 36 G. 3.*

*Indebitatus assumpsit* for goods bargained and sold.

The Plaintiff, through the intervention of a broker, sold for the Defendant a quantity of hogs' bristles and feathers, which the Defendant was to fetch away from the Plaintiff's warehouse on a subsequent day, but on the Plaintiff offering the feathers to him, he refused to have them on account of their being damaged by the moth, insisting that he had agreed for the purchase of a merchantable commodity; and to resist the present action called a witness who swore that such was the contract between

tween the parties. The Plaintiff's broker on the other hand swore that he sold them with all faults, and the Jury giving credit to his evidence, found a verdict for the Plaintiff.

The Plaintiff's counsel insisted that they were entitled to consider these goods as the property of the Defendant, and of course to recover the sum for which they were sold; but the Defendant's counsel contended that the Defendant having refused to complete his contract, the Plaintiff must keep the feathers, and recover such damages as the Jury should think him entitled to for the breach of contract. They suggested that this action was misconceived, for that until delivery of the goods it was an executory contract, and therefore that the Defendant should have been charged in a special action for not accepting the goods and completing his contract.

Lord KENYON over-ruled the last objection, but as to the quantum of damages his Lordship was at first inclined to think that the Jury ought to give the Plaintiff only such damages as he had sustained on account of the Defendant's refusal to receive the commodity; but he afterwards was of opinion that the Plaintiff had his election either to call on the Defendant in a special action on the case for not fetching away the goods, or to consider the contract as complete the moment that the sale was made, and bring an action of *indebitatus assumpsit*, for the sum at which they were sold, for no further act was to be done by the Plaintiff, the goods were bargained and sold immediately the contract was made.

The Jury accordingly found for the Plaintiff to the full value of the goods.

*Erskine and Lowes for Plaintiff.*

*Garrow and Merryall for Defendant.*

#### HORE v. MILNER.

*K. B. Sittings at Westminster, after East. T. 1797.*

*Assumpsit* for not taking away a quantity of potatoes sold by the Plaintiff to the Defendant. The first count of the declaration stated a promise by the Defendant to take away the potatoes in a reasonable time, and the declaration also contained counts for goods bargained and sold.

It

It was proved that the Defendant agreed to take away the potatoes *in a month*, but that he failing to complete that contract the Plaintiff resold them to another person. On an objection being taken to the declaration on account of the variance between the first count and the case proved, the Plaintiff's counsel contended that they had a right to recover under the count for goods bargained and sold.

But Lord KENYON held that the Plaintiff having resold the commodity, had by that act abandoned his right to insist on the Defendant taking the goods, he had not considered them as the property of the Defendant, or the contract as completed, and therefore could only recover damages for the breach of the agreement, and as he had no count agreeable to that case, directed a nonsuit.

*Ereline and Best* for Plaintiff.

*Gibbs* for Defendant.

In a subsequent case the resale was held by Lord Ellenborough to be no bar to the action, though it might perhaps be considered as a wrongful conversion, *Mertens v. Adcock*, 4 Esp. 251. But in a very recent case the Court of C. P. dissented from the doctrine of Lord Ellenborough, and appeared to consider that the seller had rescinded the contract by the resale, though eventually it became unnecessary to decide that point, *Hagedorn v. Laing*, 6 Taunt. 162. See also *Gomery v. Bond*, 3 M. and S. 376. *Hill v. Perrot*, 3 Taunt. 274. *Browning v. Stallard*, 5 Taunt. 450.

In the case of *Goodall v. Skelton*, 2 H. Black. 316, the Plaintiff agreed to sell a quantity of wool to the Defendant; a shilling earnest was paid to bind the bargain, and the wool was packed in cloths furnished by the Defendant for that purpose, and left at a hovel belonging to the Plaintiff, to which place the Defendant was to send his waggon to fetch it away in a few days; but while the Defendant's servant was weighing and packing it, and proposing to the Plaintiff to fix the hour when the waggon should come, the Plaintiff declared that it should not go off the premises till he had the money for it. The Court held clearly that there was no delivery in this case so as to enable the seller to maintain an action for *goods sold and delivered*.



Tuesday,  
March 1st.  
At Guildhall.

GORHAM and Another v. THOMPSON and  
Another.

When partners dissolve their partnership it is incumbent on them to publish the dissolution in the *Gazette*, or they will be all liable to an action at suit of a creditor who did not know of the dissolution, and delivered goods to one thinking he was dealing with all.

*ASSUMPSIT.* One of the Defendants had suffered judgment by default.

The Defendants had been partners about seven years since, and had dissolved that partnership, but no notice of the dissolution had been inserted in the *Gazette*, nor did the Plaintiff know of it, but thought they were dealing with both Defendants. But it appeared that the dissolution was generally known in the neighbourhood.

Lord KENYON said, to discharge the partner retiring from the partnership there must be a public advertisement in the *Gazette*, or at least the dissolution must be notorious to the public, and actual knowledge of it brought home to the creditor. It would be the hardest measure imaginable upon the creditor were \* the law otherwise, for while he supposed he was giving credit to a man having sufficient to satisfy the whole of his demand, he might be trusting a beggar.

[ \* 43 ]

Verdict for the Plaintiff (a).

(a) *Vide Graham and Others, v. Hope and Others, post, 154.*

CHAURAND and Another v. ANGERSTEIN.

Thursday,  
March 3d.  
At Guildhall.

*ASSUMPSIT* on a policy of insurance on a ship from *St. Domingo* to *Nantz* in *France*, lost or not lost.

The policy was effected on the 4th of *January*, 1790, and at the same time a letter of the Plaintiffs' shewn to the underwriter, wherein it was said that the ship was to sail in the month of *October* preceding. On seeing this letter the policy was subscribed at a premium of £6 *per cent*. Previous to writing this letter the owners had received two letters from their captain, wherein he said he reckoned he should sail between the 5th and the 10th of *October*. He did sail on the 11th of that month.

On the part of the Defendants several merchants and commercial men were called, who said that the expression "in the month of *October*" was well understood amongst men used to commercial affairs to signify some time between the 25th of that month, and the 1st or 2d of the succeeding month; and they said that had it been conceived that the ship was to sail between the 5th and 10th of *October*, it would have made a difference of 15 *per cent*. in the premium, \* and many underwriters would not have subscribed the policy on any terms. Mr. *Barnwell*, who was also examined as a witness, said, that he understood the expression to signify that

Commercial men may be called as witnesses to prove the meaning of any particular expression used in a letter on a commercial subject.

If it is said in a letter that a ship will sail from *St. Domingo* in the month of *October*, it is generally understood that she will not sail till the 25th of the month.

[ \* 44 ]

that the voyage was to commence on the 15th or 20th of *October*, and not before.

Lord KENYON. The party was in possession of these letters two months before the assurance was made. He might have sent copies of them without garbling any part of them, and then the underwriters might have judged for themselves. The evidence of underwriters is good evidence on this subject. In questions on the arts and sciences the evidence of persons versed in those arts is daily admitted. Foreign laws are also matters of evidence, and yet all these are only the opinions of the witnesses (a). His Lordship therefore left it to the Jury to consider whether this was not such a material suppression of facts as avoided the policy.

The Jury found for the Defendant.

In the following term a rule to shew cause why a new trial should not be had was obtained by the Plaintiff, but upon cause being shewn against that rule it was discharged, and the verdict established.

(a) *Vide Thornton v. The Royal Exchange Assurance Company*, ante, 25.

\*BELL v. DRUMMOND, Executor, &c.

[ \* 45 ]

This was an action of *assumpsit* for work and labour done and performed by the Plaintiff for *Peterson* the testator.

If a clerk to the commissioners of the land-tax be appointed clerk to the commissioners for managing other taxes, his deputy who performed all the duties of his office is not therefore intitled to an increase of salary.

It appeared that the testator was clerk to the commissioners of the land-tax, and that the Plaintiff had done the business of his office at a salary of £100 a year. That afterwards, on new duties (such as the servants' tax, &c.) being imposed, the testator was appointed clerk to the commissioners of those duties, and the Plaintiff also transacted that business, but no agreement had been made as to any increase of salary, though the labour of the office was considerably increased.

A gentleman of the name of *Till* was called, who proved that the plaintiff having demanded an additional stipend, the testator had desired the witness (as a friend to both parties) to consider what ought to be allowed the Plaintiff. That accordingly the witness did proceed to make an estimate, but before he had finally made up his mind the testator died.

All money due on account of the settled salary of £100 had been paid; the only question therefore was whether the Defendant was entitled to any additional salary.

Lord KENYON said, that had the Plaintiff's case rested wholly on the fact of the new duty being imposed

[ \* 46 ]

imposed upon him, he should not think it such a case as would have entitled him to come into a court of justice for an additional stipend on a *quantum meruit* : if it was, every porter in a shop, or clerk in an office, \* would upon an increase of his master's business be equally intitled to demand an increase of wages. But upon the evidence produced it appeared clearly that the testator himself thought that he ought to pay something, and the only matter in controversy between him and the Plaintiff was the *quantum* of the additional allowance.

The Plaintiff had a verdict,

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### LOWDEN v. GOODRICK.

Under the *alia enormia* in trespass, no facts can be given in evidence which might, consistent with decency, be stated in the declaration.

#### TRESPASS and false imprisonment.

Justification, under the act of 29 Geo. 3. (a) as a superior officer, the Plaintiff having behaved mutinously on board a *Guinea* ship.

The Plaintiff proved that for thirteen weeks he was kept in irons on the coast of *Africa*, and during all that time was exposed to the burning sun and heavy showers of that country, and that the irons galled his wrists so much that they were in danger of mortification. Further his counsel offered to prove that he was stinted in his allow-

(a) 29 Geo. 3. c. 66. § 19.

ance of food, contending that this, though not laid in the declaration, might be given in evidence to prove the malice of the Defendant.

Lord KENYON. It has been many times determined that nothing can be given in evidence under the *alia enormia*, except acts which could not be put \* on the record. It is no part of the declaration. In actions for criminal conversation and the like, things which could not with decency be put upon the record, may be proved under the *alia enormia*; but evidence like that now offered cannot be admitted under it (a). [ \* 47 ]

The Defendant having called witnesses, and proved that the Plaintiff had not been wholly blameless, the Jury found a verdict for the Plaintiff £100 damages.

(a) As to what may be given in evidence under the *alia enormia*, see *Petit v. Addington*, post, 62. *Watson v. Norbury*, Style, 201. *Bassett v. Shippon*, 1 Keb. 787. 1 Sid. 225. S. C. by the name of *Sippora v. Bassett*. *Russell v. Corn*, 6 Mod. 127. 1 Salk. 119. Lord Raym. 1031. S. C. *Newman v. Smith*, Holt, 699. *Dix v. Brookes*, 1 Str. 61. 12 Vin. Ab. Ev. T. b. 6. In a late case in C. P. which was an action of trespass for searching for game in the Plaintiff's close, the Plaintiff under the *alia enormia* gave in evidence that the Defendant, who was a magistrate and member of parliament, had, on being warned off the land, used very intemperate language to the Plaintiff, and threatened to commit him. The Jury gave a verdict for 500l. damages, which the Court of C. P. refused to set aside, Gibbs C. J. observing, that he knew not on what principle he could grant a rule in this case, unless they were to lay it down that the Jury were not justified in giving more than the absolute pecuniary damage that the Plaintiff might sustain. *Meret v. Harvey*, 5 Taunt. 442.

## STUBBING v. HEINTZ.

If when a master give his servant money to buy meat for the use of the family, the servant, instead of paying ready money order the meat on credit and embezzle the money, the master is not liable.

*ASSUMPSIT* for goods sold and delivered.

At *Midsummer* 1784, the Defendant contracted with the Plaintiff to serve him with all kinds of meat at 5½*d.* *per lb.* for *ready money*. The cook maid was accustomed to order the meat, and when the bill amounted to a few shillings or a guinea, used to pay it; in general she paid once a week, on a *Monday* morning; and the Defendant always gave the servant money to pay the bills. This course of dealing continued for a long time, and several successive servants paid the money they received from the Defendant as above stated. At length the Defendant got another cook maid, and gave her money as usual, but she did not pay the bills as the others had done, but suffered them to be in arrear £33. 3*s.* 3*d.* She then ran away from the Defendant's house, after which the Defendant was called upon, for the first time, to pay this sum of money, and on his refusal the Plaintiff brought

[ \* 48 ]

\* the present action. The Defendant also proved that when his family were absent from town in the summer, a servant, who was left to take care of the house, had meat for her own support from the Plaintiff, and paid him for the same, but he never demanded this sum of money from that servant, or mentioned to her that it was owing to him from the Defendant.

Lord KENYON said nothing could be clearer than that

that where a man gives his servant money to pay for commodities as he buys them, if the servant pockets that money, the master will not be liable to pay it over again. But if the master employs his servant to buy things on credit, he will be liable to whatever extent the servant shall pledge his credit. Here the contract between the parties was to deal for ready money: and the Plaintiff when he let the bill run on to such an amount as the sum now claimed, was giving credit to the servant, and not to the Defendant. The Defendant had not entered into any new contract, but still thought that he was dealing on the same terms as before.

Verdict for the Defendant (a).

(a) If the master never had any previous dealings with a tradesman, but a tradesman's dealings have all been with the servant whom the master has regularly paid, in that case the master shall not be charged. As where the action was for oats and hay furnished for the Defendant's horses, and Plaintiff having no dealings with the master but with the coachman, to whom the master gave money for the purpose monthly, the Plaintiff never applied to the Defendant (the master) during the time, and the demand was for years standing: it was ruled that the master was not liable. *Per Lord Kenyon in Kendal v. Andrews, Sitt. E. T. 28 G. 3. Esp. N. P. 115. Vide Precious v. Abel, 1 Esp. Rep. 351. Semb. contr.* Where *A.* having purchased goods of *B.* on credit, gives notice to *B.*'s servant that in future he shall always pay for the goods as he receives them, and accordingly pays the servant, who embezzles the money, *A.* is not discharged unless he shews that the notice reached *B.* *Per Eldon, C. J. 3 Esp. 85. and vide Hazard v. Treadwell, 1 Str. 506. Sir R. Wayland's case, 3 Salk. 234. Boulton v. Hillersden, ibid. 1 Lord Raym. 224. S. C. and cases there cited.*



# C A S E S I N K. B.

AT THE SITTINGS

AT NISI PRIUS,

AFTER EASTER TERM, 31 GEORGE III. 1791.

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Tuesday,  
June 7th. At  
Westminster.

YOUL v. HARBOTTLE.

If a carrier has goods to carry, and by mistake deliver them to a wrong person, this is such a tortious conversion as will support an action of *trover* at the suit of the right owner.

**T**ROVER for goods.

The Plaintiff had put the goods in question on board the Defendant's packet-boat, to be carried from *London* to *Gravesend*. Another person coming to the Defendant's house, and saying that these goods belonged to him, the Defendant *under a mistake* delivered them to him.

*Mingay*, for the Defendant, objected that upon this evidence the Plaintiff must be nonsuited. Here was no evidence of a conversion, and though the Defendant was liable to a special action on the case, yet *trover* could not be supported.

[ \* 50 ]      \* *Erskine* relied on the case of *Syeds* and Another v. *Hay* (a), determined last Term, which,

(a) 4 T. Rep. 260.

he

he said, shewed this act of the Defendant to be a conversion.

LORD KENYON. That case was determined on such peculiar circumstances, that it is hardly possible it should ever apply as an authority in a case not exactly parallel with it. I agree that when a carrier loses goods by accident (*a*), trover will not lie against him, but when he delivers them to a third person and is an actor, though under a mistake, this species of action may be maintained (*b*).

Verdict for Plaintiff.

(*a*) *Vide* 2 Salk. 655. *Ross v. Johnstone*, 5 Burr. 2855.

(*b*) In this case if the carrier had paid the Plaintiff the value of the goods, he might have recovered it from the person to whom the goods had been delivered, as money paid to his use, but not as the price of goods sold and delivered, *Brown v. Hodgson*, 4 Taunt. 189. Trover will not lie against a broker for the amount of goods which he being authorised to sell for a certain price sells at inferior price, *Dufresne v. Hutchinson*, 3 Taunt. 117.


### SMITH and Another v. PICKERING.

*ASSUMPSIT* by the indorsees of a bill of exchange against the acceptor. The bill was drawn by *Richardson* and *Hill* on the Defendant, and was payable to the order of the drawers. They delivered it to the Plaintiff for a valuable consideration, but forgot to indorse it. Afterwards they became bankrupts, and then *Richardson* made an indorsement on the bill.

If a trader deliver over a bill for a valuable consideration to another and forget to indorse it, he may indorse it after he has become a bankrupt.

Lord

Lord KENYON. I am clearly of opinion, that this is a good indorsement by the bankrupts. The Plaintiffs had the equitable claim, and it is clear that nothing passes to the assignees of a bankrupt, but property that really and beneficially belongs  
 [\* 51 ] to the bankrupt. \* Though the bankrupts had the legal estate in this bill, yet it was unattended by any interest, and they were bound to indorse it (a).

Verdict for Plaintiff. 

And in such case the evidence of one partner that his partner had told him at the time he had paid it away is admissible.

Note. The bankrupt *Richardson* was permitted to give this evidence, though *Hill* had delivered the bill to the Plaintiff. Lord *Kenyon* holding

(a) The Lord Chancellor on the petition of the holder of the bill will, in such cases, make an order on the bankrupt or his assignees to indorse it, *Ex parte Greening*, 13 *Ves.* 206. And where a bill was delivered with the intent of transferring the property more than two months before a commission issued, but was not actually indorsed till within the two months, Lord *Ellenborough* held, that the indorsement had relation to the delivery, and that the transaction was within 46 *G. 3. c.* 135. *s. 1.* *Anonymous*, 1 *Camp.* 492. So an assignment of goods at sea, as a collateral security for a debt, and a subsequent indorsement of a bill of lading, are good as against the assignees of the assignor, who committed an act of bankruptcy between the assignment of the goods and the indorsement of the bill of lading, *Lemprere v. Pasley*, 2 *T. R.* 485. And as an accommodation bill does not pass under a commission of bankruptcy against the payee, he may indorse it after an act of bankruptcy, and his indorsee for a valuable consideration may recover upon it against the acceptor, *Arden v. Watkins*, 3 *East.* 317. *Willis v. Freeman*, 12 *East.* 656. *Wallace v. Hardacre*, 1 *Camp.* 46. And generally a legal title made in contemplation of bankruptcy will be protected by a previous equitable title, Lord Chancellor in *Hearne v. Mill*, 13 *Ves.* 122. And *vide Ramsbotham v. Cater*, 1 *Stark.* 228.

that

that what *Hill* had told *Richardson*, at the time, might be given in evidence *by him*, the act of one partner being the act of the other; and the acknowledgment made by *Hill* to *Richardson* being against his own interest. *Hill* had absconded. In the next term *Mingay* moved for a new trial, on the ground that *Richardson's* evidence was not admissible, *but the Court discharged the rule.*

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WILLIAMS *qui tam v.* PULLEY.

*Wednesday,*  
*June 8th.*  
*At Guildhall.*

DEBT for several penalties for insuring tickets in the *Irish* lottery.

In an action for insuring tickets in the *Irish* lottery, the act of parliament establishing such lottery must be proved.

The first count of the declaration stated that the Defendant received a sum of 9*d.* to repay £1. 1*s.* in case a certain ticket therein mentioned “in a certain *Irish* Lottery, authorized and established by a certain *Irish* act of parliament, made and passed in the 29th year of the reign of his present Majesty, should be drawn, &c.”

*Erskine*, for the Defendant, objected that the act of parliament should be proved before any evidence was admitted of the insurance.

*Bearcroft*, for the Plaintiff, contended that the Defendant having admitted, by the insurance, that such an act of parliament did exist, should not be permitted now to dispute it.

Lord KENYON. I agree that in many cases a man may be estopped by his own acts from contesting

testing his situation, even in a penal action: thus if a man, *acting* as a commissioner of excise, solicit votes at an election, I would not oblige the Plaintiff to prove that he was in fact appointed to that office (*a*). Had this declaration merely stated that he had insured a ticket in a certain *Irish* lottery, it perhaps would not have been necessary for the Plaintiff to prove the act of parliament or lottery; but as a particular act of parliament is here stated, it is incumbent on him to prove that such an act of parliament did exist.

The Plaintiff was nonsuited.

(*a*) See these cases collected *Peake's Evid.* 20.

### HUMPHREY v. MOXON.

The drawer of a bill of exchange may be a witness for the acceptor to prove it paid.

*ASSUMPSIT* on a bill of exchange, indorsee against acceptor.

The Defendant's counsel offered to call the drawer to prove that the bill was paid by him, and relied on the case of *Gardner* and *Carter*, determined some time since.

*Erskine* objected to this witness. This case differs from that of *Gardner* and *Carter*, there the payee was the Plaintiff; this action is brought by the indorsee.

Lord

Lord KENYON. It makes no difference. The Courts have laid down a rule that a man shall not *destroy* his own security. This man does not come\* [ \* 53 ] to *destroy* his security, but to shew that it has been satisfied.

He was therefore received, but it appearing that notice had been given to him, the day after the bill became due, of its having been dishonoured by the acceptor, he was again objected to on account of interest.

Lord KENYON inclined to think this last objection a good one, because being liable to pay the bill himself on account of due notice having been given, by proving it paid now he destroyed the bill, and would eventually discharge himself. His Lordship however doubting whether the notice was given early enough, did not reject, but admitted his testimony, subject to the opinion of the Court if the Plaintiff chose to move for a new trial.

Quere. Whether the drawer can be a witness if he has had regular notice of the bill having been dishonoured.

The bill was for £73, and the witness proving payment of £30 only, the Plaintiff had a verdict for the balance (a).

(a) *Vide Charington v. Milner, ante, 6. Phetheon v. Whitmore, ante, 40. Adams v. Lingard & al' post, 147, and cases there cited, and Rich v. Topping, post, 224, and the note thereon.*

Thursday,  
June 9th. At  
Westminster.

## SPITTY v. BOWENS.

In an action for sinking a barge, on board of which the Plaintiff had a cargo of corn, the master may be a witness for him upon being released.

**T**HIS was an action on the case for not putting a buoy over a barge of the Defendant's which had sunk in the *Thames*; by reason whereof a barge laden with corn belonging to the Plaintiff was sunk, and the corn much injured.

To prove the accident the Plaintiff released the master of the barge, on board of which his corn was, and called him as a witness.

[ \* 54 ]

\* *Bearcroft* objected to him. If the Defendant is liable to make amends to the Plaintiff, he is liable also to make amends to the witness for the damage done his barge; and the record of the recovery in this action would be evidence against the Defendant in an action at the suit of the witness.

Lord KENYON thought that the record in this cause would not be evidence in that, and therefore that he was a competent witness, but offered to save the point if the Defendant's counsel desired it.

The weight of evidence being in favour of the Defendant, he obtained a verdict (*a*).

(*a*) *Vide Rotheroe v. Elton*, post, 84. *Lay v. Holock*, post, 101, and the cases collected *Peake's Evid.* 180.

HENBEST and Others, Assignees, &c.  
v. BROWN.

THE petitioning creditor's debt in this case was for goods sold and delivered; and the Defendant endeavoured to prove that credit was to have been given for them, and that the commission was taken out before the day of payment arrived.

LORD KENYON said, the inclination of his mind was, that all debts whatever, though not due, were sufficient, under the statute 5 Geo. 2. c. 30. to support a commission, and that the act was not confined merely to bond debts, notes, and bills.

But it not being proved that any credit was to have been given, this point was no further discussed (a).

If a trader buy goods on credit and commit an act of bankruptcy, the creditor may take out a commission before the day of payment under the 5 Geo. 2. although no written security is given for the debt. *Comme semble.*

(a) *Vide Cockran v. Love*, 1 Co. Bank. L. 23. accord. but in *Hoskins v. Duperoy*, 9 East. 498. the Court of King's Bench decided that the stat. 7 Geo. 1. c. 31. s. 1. and 5 Geo. 2. c. 30. s. 22. were confined to debts due on bills, bonds, promissory notes, or other written securities of the like sort, and that goods sold or delivered, upon an agreement to be paid for by a present bill, payable at a future day, but which was not actually given, did not create a present debt, sufficient to support a commission. So upon a sale of goods at six or nine months, the purchaser by not paying at the end of six months makes his election to take credit for the nine months, and there is no debt to support a commission of bankruptcy till the nine months are expired, *Price v. Mixon*, 5 Taunt. 338. And an admission by the petitioning creditor that the goods were sold on credit, which had not expired when the act of bankruptcy was committed, may be given in evidence in a collateral action, *Young v. Smith*, 6 Esp. 121. By stat. 49 Geo.



*Geo. 3. c. 71. s. 9.* such debts are made provable under the commission on making a rebate of interest. A plaintiff in an action for breach of promise of marriage having recovered above 100*l.* damages against a trader, who between verdict and judgment committed an act of bankruptcy, the Court of *K. B.* held, that the debt due upon the judgment after it was entered up was not a good petitioning creditor's debt whereon to found a commission against such a trader. In the matter of *Charles*, 14 *East*, 197. 16 *Ves.* 257. recognized in *Walker v. Barnes*, 1 *Marsh.* 346. and *Scott v. Ambrose*, 3 *M. and S.* 362. In *Miles v. Rawlyns*, 4 *Esp.* 194. Lord *Ellenborough* seemed to think that a warrant of attorney was *debitum in presenti* sufficient to support a commission, though it appeared by the defeasance to be given merely as a security against the running acceptances of the creditor. But in *Sarratt v. Austin*, 4 *Taunt.* 200. the Court of *C. P.* held, that if two persons exchange acceptances, and before the bills are mature one of the acceptors commits an act of bankruptcy, there is not such a debt due from him to the other as will sustain a commission before the other has paid his own acceptance. See also *Buckler v. Burtivant*, 3 *East.* 72. Entries of the petitioning creditor's debt made by the bankrupt in his books are good evidence to prove such debt, *Ewen v. Preston*, *Ca. temp. Hard.* 378. *Watts v. Thorpe*, 1 *Camp.* 376. And where such entry was made some months before the act of bankruptcy, its continuance will be presumed, *Jackson v. Irving*, 2 *Camp.* 50. In *Hoare v. Coryton*, 4 *Taunt.* 160. the Court of *C. P.* held, that an account signed by the bankrupt, charging himself with a balance brought over to a day before the bankruptcy, was not admissible evidence of the petitioning creditor's debt, without positive proof that the bankrupt allowed the account before the bankruptcy. But in *Downton v. Cross*, 1 *Esp.* 168, Lord *Kenyon* held that an acknowledgment by the bankrupt of such debt made after the act of bankruptcy, but before the suing out of the commission, was sufficient; and the like judgment was given by the Court of *King's Bench* in *Brett v. Levett*, 13 *East.* 213.

## \* FORES v. WILSON.

[ \* 55 ]

Friday, June  
10th. At  
Westminster.

THIS was an action for assaulting the maid servant of the Plaintiff, and debauching her *per quod servitium amisit*.

A master may maintain an action for debauching his servant, though he is no ways related to her in blood.

The servant was no relation to the Plaintiff, but merely a servant. The Plaintiff proved by his first witness that the Defendant enticed the girl to leave the Plaintiff's service, and kept her to live with him for some time; he then called a witness to prove that he had debauched her.

*Erskine*, for the Defendant, objected to this evidence, contending, that this action being brought by a person who was no relation to the person seduced, the Jury could not take the injury which she had sustained into their consideration.

LORD KENYON. This is an action in which damages may be given to recompense the servant for the injury she has received. Undoubtedly there must subsist some relation of master and servant, but this action materially differs from the common action for seducing a hired servant to leave her master's service. In that kind of action the Plaintiff must prove that the Defendant knew the servant was in his service, but no such knowledge is necessary to support this action. And though a degree of the relation of master and servant must subsist, yet a very slight relation is sufficient; as it has been determined, that when daughters of the highest and most opulent families have been seduced,

In an action for debauching a servant *per quod*, &c. it is not necessary to prove that she was employed as a menial servant.

[ \* 56 ]

seduced, the parent may maintain an action, on the *supposed* relation of master and servant, \* though every one must know that such a child cannot be treated as a menial servant (a).

Verdict for the Plaintiff (b).

(a) *Vide Jones v. Brown and Another, post, 233.*

(b) *Vide Edmondson v. Machel, 2 T. Rep. 4.* where it was holden that the aunt might maintain the action, and *Irvin v. Dearman, 11 East. 24.* in which the Court held that a person who had adopted the daughter of his deceased friend might recover damages *ultra* the mere loss of service. A father may bring an action of trespass, &c. for breaking his house and debauching his daughter *per quod servitium amisit*, though the daughter be above twenty-one years of age, where acts of service are proved, though there be no contract for service, *Bennett v. Allcott, 2 T. R. 156.* And he may maintain an action for a seduction while at the house of a third person, if her general residence be with him, *Johnson v. M<sup>r</sup> Adam, 5 East, 47.* But where the daughter is in the service of a third person, the father can maintain no action, though she be under twenty-one, *Dunn v. Peel, 5 East, 45.*

Saturday,  
June 11th.  
At Westminster.

### BAILEY v. GOULDSMITH.

If goods are delivered on the terms of sale or return, and the person receiving them does not return them in a reasonable time, the value of them may be recovered in an action for goods sold and delivered. *ASSUMPSIT* for goods sold and delivered. The goods were delivered on the terms of sale or return, so long since as the beginning of the year 1789, and consisted of waistcoats made in *England*, exported

exported to *France*, there embroidered, and imported again into *England*.

Two questions were made, first on the sale and return, the Defendant contending that he was not obliged to keep these goods. 2dly. Whether the goods were contraband or not.

Lord KENYON, as to the first point, said that no certain time being mentioned for the return of the goods, the Jury should consider whether a reasonable time had elapsed for the return according to the usual course of dealing in that trade. His Lordship was inclined to think there had, and if the Jury should be of that opinion he should consider them as goods *sold and delivered*. As to the second point, his Lordship said he would not determine it at *Nisi Prius*, but wished the Jury to leave that for the opinion of the Court, if they should find for the Plaintiff on the first point.

\* The Jury were about finding for the Defendant, as to all the money claimed except £1 5s. (the value of one of the waistcoats) upon which the Plaintiff's counsel consented to a nonsuit, to avoid the consequences of the Court of Conscience act (a). [ \* 57 ]

(a) *Vide Bromley v. Coxwell*, 2 Bos. & Pul. 438. where the Plaintiff being a printseller, and the Defendant a mate of an Indiaman, the latter was entrusted by the former with some prints to dispose of in India, and a written agreement was entered into, by which it was stated; " That the Plaintiff agreed  
" to send out by the Defendant certain prints, and provided  
" that if the Defendant could dispose of any one, or all of them  
" at above one guinea each, he was to be accountable to the  
" Plaintiff on his return to England, for as many as he might  
" dispose of at one guinea each; who agreed to take all, or as  
" many

" many as might be returned, provided he could not sell them in India, or at any other port he might touch at, without expecting any sum from the Defendant, or making any charge; and the Plaintiff further agreed and authorized the Defendant to sell them for whatever they might fetch, if not more than one guinea might be offered for them separately." The Defendant not being able to sell any of them in India, left the prints with an agent in India, with directions to remit the money to him in England, and the Court held that he was not answerable for the value in trover. But in *Catlin v. Bell*, 4 Camp. 183. which was an action for not accounting for goods delivered by the Plaintiff to the Defendant to be sold on her account, it appeared that the Defendant was master of a West Indiaman, and that the Plaintiff had entrusted to him a quantity of millinery goods, which he undertook to sell for her there. The Defendant not being able to sell them in the island to which they were destined, had sent them to the *Caraccas* in search of a market, where they had been destroyed by an earthquake. Lord *Ellenborough* clearly held, that the Defendant was liable; that there being a special confidence reposed in him with respect to the sale of the goods, he had no right to hand them over to another person, and to give them a new destination. And in *Hunter v. Welsh*, 1 Stark. 224. his Lordship held, that if the agent to whom goods had been consigned by his principal for sale, refuse, after a reasonable time has elapsed, to account for them, it was to be presumed that he had sold them.

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POWELL qui tam v. FARMER.

In a penal action for exercising a trade not having

served an apprenticeship, the Plaintiff is not obliged to prove that

Defendant used the trade all the time laid in the declaration, if it is said that he forfeited 40s. for each month.

DEBT on the statute of the 5th of *Eliz.* for using the trade of a Baker, not having served an apprenticeship thereto.

The first count stated, that the Defendant did set up, use and exercise the mystery, &c. of a Baker

Baker for a long time ; to wit, from, &c. to, &c. being eleven months without, &c. whereby he forfeited the sum of 22*l.* to wit, 40*s.* for each and every month during which, &c.

The second count stated that he did *use*, &c.

The Plaintiff did not prove that the Defendant used the trade for all the time laid in the declaration, but only a part of it.

LORD KENYON. It being laid that the Defendant forfeited 40*s.* for every month during which he exercised the trade, the Plaintiff is entitled to recover as many penalties of 40*s.* as he can prove months in which the Defendant used the trade. He is not obliged to prove that the Defendant exercised the trade during all the time laid in the declaration.

Verdict for the Plaintiff for one penalty of 40*s.* (a).

(a) See stat. 54 Geo. 3. c. 96. whereby the provisions of stat. 5 Eliz. as to apprentices are repealed.

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\* HOLLAND, qui tam, v. DUFFIN.

[ \* 58 ]  
Wednesday,  
June 15th.  
At Westminster.

THIS was an action to recover several sums of money forfeited for insuring tickets in the lottery, contrary to the statute 22 Geo. 3. c. 47.

The Plaintiff gave in evidence a paper, purporting to be a policy of insurance.

An illegal policy of insurance on lottery tickets may be read in evidence without being stamped.

*Mingay* objected that this paper could not be read in evidence, unless it was stamped with a 6s. agreement stamp.

*Garrow* answered, that it was an illegal contract, and therefore could never be intended by the legislature to be the object of taxation and revenue.

Lord KENYON thought it was good evidence without any stamp, but said he would save the point if the Defendant desired it (*a*).

If several tickets are insured at the same time it makes but one offence.

Ten tickets were insured at the same time. It was contended by the Plaintiff's counsel that the Plaintiff was entitled to recover a separate penalty on each ticket, each being a separate contract.

But Lord KENYON said, that the act of parliament having enacted, that if any person should insure any ticket *or tickets* he should forfeit for such offence £50, he thought this but one offence; but had they been insured at *different times*, though on the same day, he should, agreeable to the decision of the Court in (*b*) *Brooke and Milliken*, have held them to be distinct offences.

Verdict for the Plaintiff for one penalty of £50.

(*a*) *Vide Whitwell v. Dimsdale, post, 167.* and cases cited in the note on that case.

(*b*) 3 *Term Rep.* 509. But the Plaintiff can in no case recover more penalties than are included in the affidavit to hold to bail, *Phillips, qui tam, v. Mendez da Costa, 1 Esp.* 34.

KANNEN

[ \* 59 ]

## \* KANNEN v. M'MULLEN.

Thursday,  
June 16th.  
At West-  
minster.

THIS was an action for work and labour as a Surgeon and Apothecary, and medicines administered. It is a good defence in an action by an Apothecary that he treated the patient ignorantly or improperly.

The Plaintiff's case being proved, the Defendant called Mr. *Cline* and Dr. *Letsom*, who said that, from the Plaintiff's bill, it appeared that the Defendant had been very improperly treated, as medicines perfectly inconsistent with each other had been administered. They confessed that disorders would sometimes take a sudden turn, and that they could not judge so well as they should have been able to do had they attended the Defendant. Aliter if the medicines were administered under the direction of a physician.

*Erskine*, in his reply to the Jury, contended that in this action a very different question was to be tried, than in an action by the patient against the Surgeon, for improper treatment. Lord *Mansfield*, he said, had held that in no case could the Defendant make improper treatment a ground of defence, because the Plaintiff could not have proper notice of that defence, and be prepared to answer it, as in an action against him; but Lord *Kenyon* had laid down a rule that where *plain* misconduct appeared, the Plaintiff should not be permitted to recover any damages; but this must be a plain and certain misconduct, not one on which the minds of the Jury could by possibility doubt.

Lord KENYON. In a case where the demand is  
a 2 compounded



[ \* 60 ] compounded of skill and things administered, if the skill, which is a principal part, is wanting, the action fails, because the Defendant has received no benefit. \* Many cases may be imagined where great mischief would happen were the law otherwise. If a man is sent for to extract a thorn which might be pulled out with a pair of nippers, and through his misconduct it becomes necessary to amputate the limb; shall it be said, that he may come into a court of justice to recover fees for the cure of that wound which he himself has caused? I do not say that this case amounts to that put, but where shall the line be drawn? If the medicines applied had been given under the direction of a Physician, however improper they might be, the action should be supported, because the skill would not in that case be the ground of the action. His Lordship, after commenting upon the evidence, left it to the Jury to consider whether or not the Plaintiff had misconducted himself, for upon that must their verdict depend.

The Jury found for the Plaintiff for the money charged for medicines (a).

(a) See *Basten v. Butter*, 7 East, 479, and *Peake's Law Ev.* 3d ed. 266. note (p) where the cases on this subject are collected.

BLAND *v.* SWAFFORD.

THIS was an action against the Defendant for not appearing as a witness on the trial of an ejectment, wherein *Bland* was lessor of the Plaintiff, agreeable to a *subpæna* with which the Defendant had been served ; by reason whereof the Plaintiff was obliged to withdraw his record.

No action lies against a witness for non-attendance, unless the cause has been called on and the Jury sworn.

Lord KENYON declared himself of opinion that the action would not lie against a witness merely on the record being withdrawn, nor in any case unless the cause had been called on and the Jury sworn. The \* Court had no jurisdiction till such time as the Jury was sworn, and if the Plaintiff meant to bring an action against the witness for not attending, he should have suffered the cause to be called on and have been nonsuited, after which he might have maintained the present action. His Lordship was proceeding to order the Plaintiff to be called ; when *Mingay*, the Plaintiff's counsel, desired that the point might be saved, which was consented to (a).

[ \* 61 ]

The merits being against the Plaintiff, he was nonsuited.

(a) *Vide Hallet v. Mears*, 13 *East*, 15. and *Blandford v. De Tastet*, 5 *Taunt.* 260.

## BARBER v. BACKHOUSE and Others.

If there is no consideration for part of the sum contained in a bill of exchange, the Jury may apportion the damages, and need not find to the whole amount.

*ASSUMPSIT* on a bill of exchange. *Brown*, one of the Defendants, had suffered judgment by default, the other Defendants had paid £5. 9s. into Court.

As to the remainder of the money contained in the bill, they contended they were not liable. The case was as follows; the £5. 9s. paid into Court was the amount of the Plaintiff's bill for business done as an Attorney for all the Defendants; the remainder of the money was for business done for *Brown* only. The bill was drawn by *Brown* on the partnership, and accepted by him *unknown to the other Defendants*.

*Law* for the Plaintiff contended, that the £5. 9s. paid into Court, could not be applied to any other count but that on the bill of exchange, for there was no count on an Attorney's bill; and if the bill was good for part it was good for the whole.

[ \* 62 ] \* Lord KENYON declared himself to be clearly of a contrary opinion, and on this opinion a verdict was given for the Defendant.

*Law* said he would look into the cases, and take the opinion of the Court upon the case, if he found them favourable to him. He never moved the Court for a new trial; but upon Lord *Kenyon* in the next term mentioning this case in the course of argument, Mr. *Law* said he was perfectly satisfied with the decision (a).

(a) *Vide Ledger v. Ewer, post, 216. acc. And in Willis v. Freeman,*

*Freeman*, 12 *East*, 656. the Court of *K. B.* held, that the indorsees of a bill, accepted partly for value and partly for the accommodation of the drawer, might recover from the acceptor so much of the bill as was accepted for the accommodation of the drawer, though the bankruptcy of the drawer before he indorsed the bill prevented them from recovering that part which was accepted for value. *Sed vide 2 Burr.* 1082. where *Denison J.* is reported to have said, "there is a distinction between the *contract* and the *security*. If part of the contract arises on a good consideration, and part on a bad one, it is *divisible*. But it is otherwise as to the *security*. That being entire is bad for the whole." And Lord *Ellenborough C. J.* in *Tye v. Gwynne*, 2 *Camp.* 346. felt inclined to acquiesce in the dictum of *Denison J.* But in that case part of the consideration for which the security was given was illegal. And in *Scott v. Gillmore*, 2 *Taunt.* 326. where part of the consideration of a bill of exchange was illegal, the Court of *C. P.* held, that the security was entire, and could not be apportioned, and consequently that the whole bill was void. In that case *Heath J.* said, perhaps it might be different if for part of the amount of the bill there was no consideration.



### PETTIT v. ADDINGTON, Esq.

Friday, June  
17. At  
Westminster.

#### ASSAULT and false imprisonment.

The Plaintiff had obtained a warrant from Mr. *Walker*, a magistrate, to apprehend a man for an assault; and it not having been executed, she, on the 23d of *August* 1790, applied to the Defendant,

who

der a *per quod*; the common conclusion that he became and was sick, weak, &c. is not sufficient. Q. Whether a Justice of Peace has a right to commit for a contempt when not sitting in Court?

In trespass, and false imprisonment, the Plaintiff cannot give evidence of her health being injured, unless laid up.

who was also a magistrate. He being at that time engaged in other business, the Plaintiff forced herself into his room, and behaved there with great indecency, making a noise, and insisting on her business being attended to. The Defendant desired her to be quiet, and threatened to commit her unless she altered her conduct. She still persisted, and he committed \* her to *Tothil Fields Bridewell*, where she remained until the 23d of *October* following.

[ \*63 ]

Whilst she was in prison she (as was alleged by her counsel) caught the gaol fever, and communicated it to her husband, in consequence of which he died.

The declaration stated, that the Defendant assaulted, &c. and imprisoned the Plaintiff, and kept and detained, &c. from, &c. to, &c. *during all which time* she laboured under great pain of body and anxiety of mind, and *became and was* sick, weak and distempered.

LORD KENYON said, that as this was not laid with a *per quod*, the Jury could not take into their consideration, nor could he receive evidence of the fact of her getting the gaol fever; for it did not appear to be in consequence of the imprisonment. As to the great question whether a magistrate, not sitting as chairman of a court, but at his private office, could commit for a contempt, he must own he had a leaning on his mind, but still he would not deliver or intimate any opinion, as he wished it to be seriously considered and determined in Court. His Lordship therefore directed the Jury  
to

to find a verdict for the Plaintiff, subject to the opinion of the Court on that point (a).

In the following term this cause was argued by *Erskine* for the Plaintiff; but the Court did not then give judgment, and I believe the case has not since been before the Court.

(a) *Vide Lowden v. Goodrick, ante, 46.*

\* DAWE and Others v. HOLDSWORTH and Others. [ \* 64 ]

TROVER for horses, &c. which had been assigned by one *Pittard* to the Plaintiffs, under a bill of sale.

The defence set up was, that *Pittard* had become a bankrupt, and that the Defendants were his assignees. That after this bill of sale he continued in possession of the waggons and horses, selling some and buying others in their room, and exercising every act of ownership over them; wherefore, as against the Defendants, this bill of sale was fraudulent and void.

To establish the bankruptcy, the Defendants proved that *Pittard* was a trader, and continued so till the year 1785; when he became indebted to one creditor in £200; upon whose petition a commission of bankrupt issued against him. The debt

To support a commission of bankrupt it is necessary that the petitioning creditor's debt should be contracted before the bankrupt ceases to be a trader. But if the debt be contracted whilst he is in trade, and a bond given for it afterwards, it is sufficient.

was

was contracted for goods sold, but a bond was afterwards given.

*Bearcroft* for the Plaintiff objected, that they could not give other evidence of the debt, than by proving the bond.

Lord KENYON. Though the bond would be a bar to an action on a simple contract, yet it does not preclude the Defendants in this case from proving the consideration. If it were so, a man becoming indebted whilst a trader, and giving a bond for the debt after he had left off business, could not be made a bankrupt on it. But I hold the contrary to be clearly the law, for the question to be considered is, whether the debt was *contracted* during the time he was a trader (*a*).

[ \* 65 ] \* The Plaintiff, on the cross examination of the Defendant's witness, proved that there were other dealings between the bankrupt and the petitioning creditor after 1785, when the bankrupt ceased to be a trader, and that, though at the time the commission was taken out, there was a considerable larger balance than £200 due to the petitioning creditor, yet that more than £200 had been paid on account between the year 1785 and that time.

(*a*) *Vide Ambrose v. Clendon*, 2 *Stra.* 1042, and *Cas. temp. Hardw.* 267. accord. So a debt for money lent, due to a creditor at the time when an act of bankruptcy is committed by the debtor, is sufficient to support a commission against him, though afterwards, and before the petitioning for such commission, the creditor obtains judgment against him for a sum of money, including such debt; and the affidavit made in order to obtain the commission, may be an affidavit *for money lent*. *Bryant v. Withers*, 2 *M. and S.* 123.

Lord

Lord KENYON. As no particular directions were given about the application of the money paid on account, I must place it to pay off the old debt first; if so, it appears that no part of the debt contracted during the time *Pittard* was a trader, was due when the commission issued, and consequently it is unsupported (a).

The Jury therefore found a verdict for the Plaintiff.

(a) *Meggott, assignee, &c. v. Mills*, 1 Lord Raymd. 286. Comb. 463. S. C. acc. In *Peters v. Anderson*, 5 Taunt. 601. Gibbs C. J. referring to this case of *Dawe v. Holdsworth*, observed, "that the bond was not given in evidence; therefore it appeared that the bond had been excluded from the view of the Judge before the debt, which was contracted after the debtor ceased to trade, was presented to the Court: it stood thus, A man deals for five years as a trader, then leaves off trading, then goes on dealing for five years more; and the Court mean to say this: It cannot be considered that the debtor meant to leave this debt outstanding, which subjects him to such severe consequences, when he had done that which, if he were so inclined, was a discharge of it. The case therefore goes exactly so far and no farther than the case in *Lord Raymond*; it must be taken as if there were no bond, for none was proved." And in giving judgment, the Court observed on the cases of *Dawe v. Holdsworth*, and *Meggott v. Mills*, and said, "looking at them, you will see it is only the circumstance of the payee being a trader, and the consideration of bankruptcy, which made it a question there. In *Meggott v. Mills*, however, the debts were both for goods, both arose on the same account, and it was wholly immaterial to which end of the account the payment might be applied: and Lord Holt thought it should be inferred that the payee intended it to be so applied as to avoid what was then thought the criminality of a bankruptcy. The Court would presume the Defendant did not mean to commit an offence. So in *Dawe v. Holdsworth*, if the first debt incurred



“curred while he was a trader was paid off, there was no  
 “petitioning creditor’s debt; if it was not paid there was a good  
 “petitioning creditor’s debt. I consider this case as standing  
 “on the authority of Lord *Raymond*, and that the Court meant  
 “to say that it would be too hard that a man having made a  
 “payment sufficient to exempt him from the operation of the  
 “bankrupt laws, should not have the benefit of paying off that  
 “part of his debt which subjected him to those laws. Lord  
 “*Kenyon* and Lord *Holt* went both on that ground; it is an  
 “exception, and founded on the circumstance of bankruptcy.”

In the case of *Peters v. Anderson*, the Plaintiff had served the Defendant three years under a covenant, and three years and a quarter more under a simple contract. He received goods and money during the first period in part payment; he also received goods and money during the second period; the whole receipts more than covered the salary due under the covenant; the parties kept a blended account, and made no rest in it at the end of the first period. The Court of *C. P.* held, that the Plaintiff had the election to ascribe to the second debt, for which he had the worse security, the value received in the second period, and was therefore entitled to recover the balance of wages due for the first period in an action of covenant, and for the second in an action of *assumpsit*. In the course of the judgment the Court said, “It is admitted if there were a debt  
 “due on bond and another for goods sold, the person receiving  
 “an unappropriated payment might apply it to which account  
 “he would.” So in *Plomer v. Long*, 1 *Stark.* 153. Lord *Ellenborough* C. J. held, that a payment by the obligor of a bond to the obligee, to whom the obligor was also otherwise indebted, could not without some circumstances to shew that it was intended to be made in discharge of the bond, be so applied in favour of the surety of the obligor, under the plea of payment to an action upon the bond. Though in *Hammersley v. Knowllys*, 2 *Esp.* 66. Lord *Kenyon* held, that the note of *A.* being deposited by *B.* at his bankers as a security for money, the bankers knowing it was an accommodation note; and *B.* afterwards paying money to his bankers without any specific appropriation of it, that money must be placed as far as it would go in discharge of the then existing debt; and that the banker could  
 not

not hold the maker of the note responsible for more than the balance remaining due at the time of such payment, though he afterwards trusted his debtor with a further sum of money. See also *Newmarch v. Clay*, 14 *East*, 239. The cases in equity are not more reconcilable than those at common law. In *Heyward v. Lomax*, 1 *Vern.* 24. it was ruled that if *A.*, being indebted by mortgage and also for goods to *B.*, pay money generally, it shall be taken to have been paid towards discharge of the money due on the mortgage which carried interest. So if one is indebted by bond and for goods sold, *Prowse v. Worthing*, 2 *Brownl.* 107. So if one owes 40*l.* by bond for the payment of 20*l.* at such a day, and 20*l.* by simple contract to the same person payable at the same day, and at the day he pays 20*l.* without telling for which it is, it shall be a payment in equity upon the bond, because that is most penal upon him, *Anon.* 12 *Mod.* 559. But in a later case of *Manning v. Western*, 2 *Vern.* 606. where *A.* being indebted to *B.* by specialty, viz. articles under hand and seal, and also on simple contract on a running account, paid several sums, and entered them in his own book as paid on account of what was due on the articles. Lord *Cowper*, C. said that the rule *Quicquid solvitur, solvitur secundum modum solventis*, is to be understood only when the person paying declares at the time of payment on what account he pays it; but if the payment is general, the application is in the receiver, and the entry in *A.*'s book is not sufficient to make the application, vide *Wilkinson v. Sterne*, 9 *Mod.* 427. In *Clayton's* case, which arose in *Devaynes v. Noble*, 1 *Merivale*, 585. most of the cases on this subject were cited, and the *Master of the Rolls*, after a luminous exposition of the principle of the application of payments according to the rules of the civil law, observed of the cases that had been cited, that they set up two conflicting rules—the presumed intention of the debtor, which in some instances at least is to govern; and the *ex post facto* election of the creditor, which in other instances is to prevail. “I should therefore,” he continued, “feel myself a good deal embarrassed if the general question of the creditor's right to make the application of indefinite payments were now necessarily to be determined. But I think the present case distinguishable from any of those in which that

“ point

“ point has been decided in the creditor’s favour.” The question in that case was, whether the estate of a deceased partner in a banking house was liable to a creditor who kept a running account with the house both before and after his death, the surviving partners having become bankrupts. At the time of the partner’s death a considerable balance was due to the creditor, but he had since drawn out more than its amount, although, from sums subsequently paid in, the balance due to the creditor at the time of the bankruptcy was greater than that due at the death of the partner. The creditor contended that as the sums paid in since the partner’s death more than covered the sums drawn out since that time, he might come upon the estate of the deceased partner for the balance due at the time of his death, but the *Master of the Rolls* held the contrary. He said, “ This is “ the case of a banking account, where all the sums paid in form “ one blended fund, the parts of which have no longer any “ distinct existence. In such a case there is no room for any “ other appropriation than that which arises from the order in “ which the receipts and payments take place and are carried “ into the account. Presumedly, it is the first sum paid in that “ is first drawn out. It is the first item on the debit side of “ the account that is discharged or reduced by the first item on “ the credit side. The appropriation is made by the very act “ of setting the two items against each other. Upon that prin- “ ciple all accounts current are settled, and particularly cash “ accounts. When there has been a continuation of dealings, “ in what way can it be ascertained whether the specific balance “ due on a given day has or has not been discharged, but by “ examining whether payments to the amount of that balance “ appear by the account to have been made? You are not to “ take the accounts backwards, and strike the balance at the “ head instead of the foot of it.” *Clayton’s* case was recognised and acted upon in *Bodenham v. Purchas*, 2 Barnw. and A. 39.

## KEMPLAND v. MACAULEY and Another.

THIS was an action against the sheriff of *Middlesex*, for a false return of a *fieri facias*.

The sheriffs were nominal Defendants only, the real Defendant was another creditor who had also sued out a *fieri facias* against the goods of the debtor; but which execution was not delivered to the sheriff till after that at the suit of the Plaintiff had been delivered. The Defendants levied the goods on the other writ in preference to the Plaintiff's, contending that his writ was fraudulently sued out to cover the goods. \* Of course the real existence of the Plaintiff's debt came in question.

Evidence that the original defendant acknowledged the debt is admissible in an action against the sheriff, for a false return. *4 Term Rep. 436. S. C.*

[ \* 66 ]

Amongst other evidence the Plaintiff called a witness to prove that the Defendant in the former cause (who was the son of the Plaintiff) had acknowledged to him that he owed the debt.

*Erskine*, for the Defendant, objected that though this was good evidence against the original Defendant, yet it was not so in this action, for the defence was that this admission was fraudulent, and made for the purpose of protecting the goods against fair creditors. If this was to be allowed, two persons who meant to defraud a third, would always have it in their power to do so.

Lord KENYON thought this good evidence in this cause. It is the daily practice in actions brought

brought by assignees of a bankrupt, to prove declarations of the bankrupt before he became so : but at the same time his Lordship said he would take a note of the objection.

If a *fi. fa.* be delivered to the sheriff, and he is directed not to levy thereon till a future day, and in the mean time another writ is delivered, he is to levy on the second writ as if no other had been delivered to him.

The Defendant then produced a letter from the Plaintiff's attorney to the sheriff's officer, wherein he directed him not to levy under the writ till a future day ; before which day arrived, the other creditor's writ had come to the office, and the sheriff levied thereon.

Lord KENYON was of opinion, that though in general the sheriff must first levy on the writ which he first receives, yet if the Plaintiff in that writ directs it not to be executed before a distant day, and in the mean time another execution comes, the sheriff is not to keep the first writ hanging over the heads of other creditors, but is to levy under the last execution as if no other had ever been delivered to him.

On his Lordship declaring his opinion, the Plaintiff's counsel consented to a nonsuit (*a*).

(*a*) *Vide Smallcomb v. Buckingham, Salk. 320. 1 Lord Raym. 251. Bradley v. Windham, 1 Wils. 44. accord.*

## PHILPOT v. HOLMES.

Saturday,  
June 18th.  
At West-  
minster.

TRESPASS for breaking and entering close, &c.  
Plea general issue.

The Plaintiff proved that he was in the actual possession of the close in question, and that the Defendant committed the trespass complained of. In answer to this the Defendant offered to prove that a part of this close was the property of other persons, and that the Defendant by their orders entered that part.

Where the Plaintiff is in the actual occupation of the close, the Defendant cannot, in an action of trespass, give evidence of property in a stranger under the general issue (a).

Lord KENYON. Where the land is not in the actual possession of any person, as commons and the like, the Defendant may prove the legal possession to be in a third person, on the general issue; but as in this case the Plaintiff was in the actual occupation, though he had no legal right whatever, the Defendant cannot defend himself on these pleadings.

Verdict for the Plaintiff.

(a) *Vide Dodd against Kyffin*, 7 T. Rep. 354. and *Argent v. Durrant*, 8 T. Rep. 403. contra. *Vide etiam Denisley v. Nevil*, 1 Leon. 301. *Chambers v. Donaldson*, 11 East, 72.

*Tuesday,  
June 21.  
At Guildhall.*

# WARWICKE v. NOAKES.

If a debtor is directed by his creditor to remit money by the post and it is lost, the creditor must bear the loss.

*ASSUMPSIT* for goods sold and delivered, and money had and received.

\* The Plaintiff was a hop merchant, and the Defendant his customer, living at *Sherborne* in *Dorsetshire*. The Plaintiff sold him hops, and also sold hops to several other persons in that neighbourhood; and requested the Defendant (as his friend) to receive the money due to him from his other customers, and remit him by the post a bill for those sums, and also the money due to him from the Defendant himself. A bill was accordingly remitted, but the letter got into bad hands, and the bill was received by some third person at the banker's on whom it was drawn.

[ \* 68 ]

Lord KENYON. Had no directions been given about the mode of remittance, still this being done in the usual way of transacting business of this nature, I should have held the Defendant clearly discharged from the money he had received as agent. It was so determined in the Court of Chancery forty years since: and as the Plaintiff in this case directed the Defendant to remit the whole money in this way, it was remitted at the peril of the Plaintiff.

The Plaintiff was nonsuited.

WILLIAMS

## WILLIAMS v. DYDE and Others.

To this action of *assumpsit* for goods sold and delivered, the Defendants pleaded their discharge, under a commission of bankruptcy.

The Plaintiff's counsel stated, that the Defendants had promised to pay the debt, after they were discharged by their certificate.

\* *Erskine*, for the Defendants, objected that this promise could not be given in evidence under the count for goods sold and delivered. To avail himself of this promise, the Plaintiff should have declared specially, that the Defendants being indebted, and having been discharged under the commission, promised to pay the debt from which they had been so discharged.

Where a bankrupt promises to pay a debt due before his bankruptcy, the Plaintiff may declare generally on the original consideration.

[ \* 69 ]

LORD KENYON. I think this declaration is sufficient as it stands. In cases where the statute of limitations has been pleaded, the replication that he did promise within six years has always been held sufficient, for the new promise revives the old debt.

Verdict for the Plaintiff (a).

(a) *Russell v. Hardman*, K. B. Mich. Term 33 Geo. 3. accord. Where the bankrupt promises to pay when he is able, the Plaintiff must prove his ability. So held by *Gould and Heath*, Justices, contrary to the opinion of Lord *Loughborough* C. J. in *Besford v. Saunders*, 2 H. Blac. 116. In *Bailey v. Dillon*, 2 Burr. 736. the bankrupt being held to bail on such a promise the Court discharged him on a common appearance.



*Wednesday.*  
*June 22.*

WRAY Assignee, &c. v. BARWIS.

If an action brought under the direction of the Court of Chancery is defeated by a formal objection, that Court will make the person taking such objection pay all costs. Q. Whether the assignee of a bankrupt can maintain an action for money had and received against his co-assignee who has been removed (a).

THIS was an action for money had and received. The Plaintiff and the Defendant were joint assignees under a commission of bankrupt; but the Defendant having received money due to the bankrupt's estate for which he had not accounted, the creditors presented a petition to the *Lord Chancellor* for his removal, who, upon hearing of that petition, made an order to remove him, and that the Plaintiff, the other assignee, "might proceed" as he should be advised," but no specific directions were given for the bringing this action.

\* *Bearcroft*, for the Defendant, was proceeding to make a formal objection to the action, but he was stopped by Lord *Kenyon*, who said it would be prejudicial rather than advantageous to the Defendant to nonsuit the Plaintiff in this action; for that it was a constant rule in the Court of Chancery, to make the Defendant pay all costs when he defeated an action brought under the direction of that Court, by a formal objection; and though this action was not specifically directed by the Court, still the consequence would be the same to the Defendant.

[ \* 70 ]

Verdict for the Plaintiff.

(a) See *Smith and Others v. Jameson and Another*, post, 213.

# C A S E S I N K. B.

AT THE SITTINGS

AT NISI PRIUS,

AFTER TRINITY TERM, 31 GEORGE III. 1791.

LONGCHAMPS dem. EVITTS v. FAWCETT.

1791.  
Friday, July  
15. At  
Guildhall.

THE lessor of the Plaintiff claimed the premises in question under a lease from one *Andrews*, who had since become a bankrupt. The Defendant also claimed under a lease from *Andrews*; but the lease granted to him was of a date subsequent to that under which the lessor of the Plaintiff claimed.

In an ejectment between two persons, (both claiming under a demise from the same person) the landlord, who has become a bankrupt, may be a witness to prove that the premises in dispute were not included in the first lease.

There being an ambiguity in the words of the first deed, the Defendant called *Andrews* as a witness, to prove that the premises in dispute were not included in the premises demised by that deed (a).

On an objection being made to his competency,

(a) In the case of *Doc dem. Freeland* against *Burt*, 1 *T. Rep.* 701. the Court held that the lessor was not estopped by his deed from going into evidence to shew the extent of the premises demised.

Lord

Lord *Kenyon* said, that as he had parted with the reversion, by the assignment under the commission, he was an admissible witness; but that he should have thought him incompetent, had he still been intitled to the reversion.

He was accordingly (after releasing his allowance and surplus) permitted to give evidence; and on his evidence the Defendant obtained a verdict (a).

(a) *Vide Bell v. Harwood*, 3 Term Rep. 308. where the lessor was admitted as a witness.

### HARRIS v. WATSON.

No action will lie at the suit of a sailor on a promise of the captain to pay him extra wages in consideration of his doing more than the ordinary share of duty in navigating the ship.

IN this case the declaration stated, that the Plaintiff being a seaman on board the ship *Alexander*, of which the Defendant was master and commander, and which was bound on a voyage to *Lisbon*: whilst the ship was on her voyage, the Defendant, in consideration that the Plaintiff would perform some extra work, in navigating the ship, promised to pay him five guineas over and above his common wages. There were other counts for work and labour, &c.

The Plaintiff proved that the ship being in danger, the Defendant, to induce the seamen to exert themselves, made the promise stated in the first count.

Lord

Lord KENYON. If this action was to be supported, it would materially affect the navigation of this kingdom. It has been long since determined, that when the freight is lost, the wages are also lost (*a*). This rule was founded on a principle of policy, for if sailors were in all events to have their wages, and in times of danger intitled to insist on an extra charge on such a promise \* as this, they [ \* 73 ] would in many cases suffer a ship to sink, unless the captain would pay any extravagant demand they might think proper to make.

The Plaintiff was nonsuited (*b*).

(*a*) *Harman v. Bawden & al*, 3 Bar. 1844. *Abernethy v. Landedale*, Doug. 520.

(*b*) Nor will such an action lie where the contract is made on shore, and the extra work is occasioned by the desertion of part of the crew, *Stilk v. Myrick*, 6 Esp. 129. and 2 Camp. 317. where Lord Ellenborough approved of the decision in the principal case.

## FARISH v. WILSON.

Tuesday,  
19th July. At  
Westminster.

*ASSUMPSIT* for money had and received.

No action at  
law lies for a  
legacy.

It was brought to recover a sum of £250 Bank-stock, being a legacy left to the Plaintiff's wife. The Defendant was the agent of the Plaintiff, and had, as stated by the Plaintiff, received the money.

Lord KENYON. Had this action been against the

the trustee or executor, I am clearly of opinion it could not be maintained. It is true there was one case, where it was said (*a*), that an action would lie for a legacy, but the very Judges who determined that case had *more than a doubt* upon their minds afterwards. And it is highly convenient and beneficial that Courts of Equity should have the sole jurisdiction in these cases. Those courts make provision for children, infants, married women, &c. according to the situation of the parties and circumstances of the case; whereas a court of law can only proceed according to the strict rules of law, without at all consulting the convenience of the parties. This is not the present case; I only took this opportunity of delivering my opinion, lest it should be thought that I was of opinion that in any case an action at law would lie for a legacy.

[ \* 74 ]      \* The Plaintiff, not proving the case stated, was nonsuited (*b*).

(*a*) *Vide* 2 Sid. 21. 85. *Keb.* 116.

(*b*) *Vide* *Atkins v. Hill*, Cowp. 284. *Hawkes v. Sanders*, *ibid.* 269. *Rose & Wife v. Bowler*, 1 H. Black. 109. *Deeks & Wife v. Strutt*, 5 Term Rep. 690. *Mayor, &c. of Southampton v. Greaves*, 8 T. Rep. 593. *Nicholson v. Shirman*, 1 Sid. 45. *Sir T. Raym.* 23. S. C. But it has been determined that a legacy payable out of land may be recovered by action against the heir. *Vide* *Butler v. Butler*, 2 Lev. 21. and *Ewer v. Jones*, Salk. 415; and in a late case where a leasehold estate had been bequeathed, and the executor had assented to the bequest, the devisee was permitted to recover the possession by ejectment, *Doe dem. Lord Saye & Sele v. Guy*, 3 East, 120.

WORRAL

## WORRAL v. HAND, Administratrix.

*ASSUMPSIT* for goods sold and delivered, &c.

Pleas *non assumpsit*, *plene administravit*, and bonds outstanding.

The Plaintiff proved that the intestate was a publican, and that for some time after his death the Defendant lived in the house, and afterwards sold the good-will of the trade for a sum of money.

On an objection by the Defendant's counsel, that this money was not assets in the hands of the Defendant,

Lord KENYON said, it was assets in her hands; though she was tenant at will after the death of the intestate. In the Court of Chancery, his Lordship said, it was the daily practice to consider all beneficial interests, such as renewable leases and the like, as assets, and to charge the representative with the money arising from them, and this was analogous to those cases (a).

The Defendant proving her plea of *plene administravit*, the Plaintiff took a verdict on the general issue, and the other issues were found for the Defendant.

Money received by an executrix for the good-will of a public house is assets in her hands.

(a) *Vide Jury v. Woodhouse, Barnes, 333.*

[ \* 75 ]

Thursday,  
July 21st. At  
Westminster.

## \* The KING v. PEARCE.

To prove the Defendant author of a libel, evidence of other libels written by the same person and concerning the same subject may be received.

THIS was an information against the Defendant for a libel on the Duke of *Athol*, on his petitioning parliament respecting the *Isle of Man*.

To prove the Defendant the editor of the paper and author of the libel, *Luxford* the printer was called. He swore that he received the manuscript of the libel from the Defendant, and returned it to him (a). To corroborate the testimony of this witness, the prosecutor offered to give in evidence several paragraphs (written by the Defendant concerning the prosecutor and the *Isle of Man*) which were not stated in the information.

On an objection to this evidence,

Lord KENYON said, that though these were several and distinct offences, yet they might be received as evidence to corroborate the testimony of *Luxford*, and shew the Defendant to be the author of the present libel.

A copy of a newspaper may be read in evidence, though not stamped according to act of parliament.

The witness then produced his copy of the paper which he had filed, but which was not stamped, and swore that the public newspaper called *The Morning Herald* (of which that was a copy) was published to the world in the ordinary way.

To prove the publication of a newspaper it is not necessary to produce a copy which has been actually published.

Two objections were made to this evidence;

(a) Notice had been given to the Defendant to produce it.  
first,

first, that the copy produced was not stamped. Secondly, that a paper which had been actually published to the world should be produced.

\* Lord KENYON. This is not like the case of [ \* 76 ] deeds and agreements, where the acts of parliament expressly declare that no such instruments shall be read in evidence until stamped. Though the publisher of a paper would be liable to a penalty, for not getting the paper stamped before publication, yet it may be given in evidence. The publication of the paper is sufficiently proved by the evidence of the witness, who says that it was published in the usual way.

On the further examination of *Luxford*, it appeared that he had not delivered the original manuscript to the Defendant himself, but that he had delivered it to his own servant, who proved that he had delivered it to the servant of the Defendant.

Proof of delivery of a paper to the servant of the Defendant is not of itself sufficient to enable the prosecutor to give parol evidence of it.

Lord KENYON said this was not sufficient evidence to enable the prosecutor to give parol evidence of the existence of the paper; there was therefore no ground for considering the Defendant as the *author* of the libel. The only remaining question was whether he was proved to be the editor of the paper or not.

The Jury found the Defendant guilty.



Tuesday,  
July 26th.  
At Guildhall.

VALENTINE v. VAUGHAN.

A school-master buying books and shoes, and selling them at an advanced price to his scholars, is not a trader within the bankrupt laws.

**T**RESPASS for taking goods.

Justification as messenger under a commission of bankrupt.

The only question in the cause was, whether the Plaintiff was a trader within the bankrupt laws. He was a schoolmaster, and *as such* had bought \* school-books to the amount of £30 or 40 annually, which he retailed to his scholars at an advanced price. He also bought shoes, and supplied his scholars with them at a profit.

[ \* 77 ]

Lord KENYON was clearly of opinion that this was no trading within the bankrupt laws: wherefore the Plaintiff had a verdict (a).

(a) So the owner of a colliery, buying articles and selling them again to his own pitmen, would not be a trader, *per Eldon C. in Ex parte Gallimore, 2 Rose, Ca. in Bankruptcy, 424.*

Wednesday,  
July 27th.  
At Guildhall.

DU BARRE<sup>1</sup> v. LIVETTE.

An interpreter who is present at conversations between a

**T**HIS was an action of trover for jewels. &c. which had been stolen from the Plaintiff's house in *France*.

The

foreigner and his attorney is bound to the same secrecy as the attorney himself, and ought not to divulge the facts confided to him *after* the cause for the purpose of which the confidence was placed is at an end.

The Defendant was one of the robbers, and had been indicted at the *Old Bailey* for the theft, but it appearing that the robbery was committed in a foreign country, he was acquitted.

Previous to the trial at the *Old Bailey* he had several conversations with his attorney (*Crossley*), but the Defendant being a *Frenchman*, and *Crossley* not understanding that language, it was found necessary to have an interpreter, which office was performed by a man of the name of *Rimond*.

*Rimond* was now called as a witness, to prove that the Defendant at those meetings admitted that he had stolen the diamonds, &c. and had no property in them. Immediately the witness discovered the wickedness of the transaction, he abandoned the Defendant.

\* The Defendant's counsel objected to *Rimond* being permitted to give this evidence, contending that this was a confidence which ought not to be broken.

[ \* 78 ]

*Garrow*, for the Plaintiff, argued that this evidence ought to be admitted. No confidence was reposed in *Rimond*; he was merely the organ which conveyed the sentiments of the Defendant to his attorney, and those of the attorney to the Defendant. When he had done this, his duty was over, and he had no further concern with the Defendant. A case much stronger than this, he said, had been lately determined by Mr. Justice *Buller* on the Northern circuit. That was a case in which the life of the prisoner was at stake. The name of it was *The King v. Sparkes*. There the prisoner  
being

being a papist had made a confession before a protestant clergyman, of the crime for which he was indicted, and that confession was permitted to be given in evidence on the trial, and he was convicted and executed. The reason against admitting that evidence was much stronger than in the present case; there the prisoner came to the priest for ghostly comfort, and to ease his conscience oppressed with guilt. Besides, in this case the confidence, if any was reposed, was at an end. The confidence was merely as it respected the trial then coming on, without any reference to this cause, which was not then thought of, and supposing it could not be given in evidence on that trial, still it is admissible on the present, when the purpose for which it is given is at an end.

[ \* 79 ]

Lord KENYON. It is sufficient for me, sitting here, to say that this case materially differs from that cited, \* but I should have paused before I admitted the evidence there admitted. The case, as it respects the Judge who determined it, is intitled to every attention from me: but this case differs from it. The Popish religion is now unknown to the law of this country, nor was it necessary for the prisoner to make that confession to aid him in his defence. But the relation between attorney and client is as old as the law itself. It is absolutely necessary that the client should unbosom himself to his attorney, who would otherwise not know how to defend him. In a case like the present it is equally necessary that an interpreter should be employed: every thing said before that interpreter was equally in confidence as if

if said to the attorney when no interpreter was present; he was the organ through which the prisoner conveyed information to the attorney, and it is immaterial whether the cause for the defence of which the conversation passed is at an end or not, it ought equally to remain locked up in the bosoms of those to whom it was communicated. His Lordship confessed he spoke with some doubt, but as the Plaintiff had other witnesses to call, he wished this evidence not to be received, lest a new trial should be granted on account of his having improperly received it.

The witness was permitted to reveal such conversation as he had with the Defendant in the absence of *Crossley*.

The Plaintiff obtained a verdict (a).

(a) *Vide Cobben v. Kendrick*, 4 T. Rep. 431. *Wilson v. Rastal*, *ibid.* 753, and *Duffin v. Smith*, *post*, 108.

[ \* 80 ]

\* BAKER and Others v. CHARLTON.

*Thursday,*  
*July 28th.*  
*At Guildhall.*

*ASSUMPSIT* on a bill of exchange by the indorsees against the Defendant as one of the drawers, the other drawers having become bankrupts.

The bill was drawn in the firm of "*James King and Co.*" under which firm the Defendant and his partners had traded. It also appeared that there were other partnerships carried on under the firm of "*James King and Co.*" in which the other

If several persons trade under a particular firm, and some, without the concurrence of others, draw bills under that firm, all are liable to an indorsee.

other drawers were concerned, but in which the Defendant had no share. The Defendant offered to shew that this bill was not drawn on account of the partnership in which he was concerned, but on account of one of the others; and that he knew nothing of it.

Lord KENYON was of opinion that the Defendant was nevertheless liable; he had traded with the other partners under that firm, and persons taking bills under it, though without his knowledge, had a right to look to him for payment. His Lordship said it was an imprudent thing for a man to enter into partnership with any person unless he had the most implicit confidence in his integrity. He remembered Lord *Mansfield* mentioning a case where a gentleman of great fortune had lent a sum of money to a house, and was to receive interest according to the profits of the business. He had no idea, at the time, that this constituted him a partner, but it was so determined; and he was absolutely ruined, though he never \* intermeddled in the management of the business (a). *One partner may pledge the credit of the other to any amount (b).*

[ \* 81 ]

Verdict for Plaintiffs.

(a) *Vide 2 Black. 1001.*

(b) *Vide Willet v. Chambers, Cowp. 814.* This must be understood as applicable only to the case of a person who thinks he is dealing with both partners; for if *A.* and *B.* are in partnership, and *A.* becomes indebted on his separate account to *C.* he cannot make *B.* liable to *C.* by accepting or drawing a bill in the partnership firm. Both law and justice concur in preventing the commission of so gross a fraud. See *Barber v. Backhouse,*  
*ante,*

*ante*, 61, and *Pinkney v. Hale*, 1 *Salk.* 126. *Swan v. Steele*, 7 *East*, 210. *Shirroff v. Wilkes*, 1 *East*, 48. *Jacaud v. French*, 12 *East*, 322. *Ridley v. Taylor*, 13 *East*, 175. *Elmly v. Lye*, 15 *East*, 10. *Ex parte Bonbonus*, 8 *Vez.* 542. *Ex parte Gardner*, 15 *Vez.* 286. *Wightman v. Townroe*, 1 *Maule and S.* 412. *Duncan v. Lowndes*, 3 *Campb.* 478. *Denton v. Rodie*, *ib.* 493. *Wrightson v. Pullam*, 1 *Stark.* 375.

### WHITE v. BOULTON and Others.

THIS was an action against the Defendants, who were proprietors of the *Chester* mail coach, for the negligence of the driver, by reason whereof the coach was overturned, and the Plaintiff's arm broken. The action was in *assumpsit*; the declaration stated that the Defendants were proprietors of the coach, and that in consideration the Plaintiff had paid them three guineas for his carriage, they undertook to carry him safely, &c.

The proprietors of a mail coach are answerable for any injury happening to a passenger through the misconduct of their driver.

The Plaintiff having proved his case, *Mingay*, for the Defendants, said that he was told a case of *Harris and Wilson* had been tried before Lord *Loughborough* at the *Common Pleas Sittings* after *Easter Term* last, in which his Lordship had held that the proprietors of a mail coach were not answerable for the negligence of their servants; saying that those coaches were not under the government of the proprietors, but the concern of the public, being established merely for the con-

veyance

veyance of letters; and therefore if any person travelled in them, he went at his own risk, and the law implied no promise for his safety.

[ \* 82 ] Lord KENYON said he was certain that no such determination had ever been made by Lord *Loughborough*. It was too absurd to enter into the head of any man. Doubts had been entertained by great lawyers in the last and beginning of the present century, whether the post-master-general was liable for letters sent (a). He would not deliver any opinion on that point, as it had nothing to do with the present case; for when these coaches carried *passengers*, the proprietors of them were bound to carry them safely and properly.

The Plaintiff had a verdict, and £60 damages.

(a) See *Lane v. Sir Robert Cotton and Another*. 1 Lord Raym. 646, &c. This question was laid at rest by the case of *Whitfield v. Lord Le Despencer et al*, Cowp. 754, where it was determined that no action would lie against any member of the post-office, unless he had been *personally* negligent. *Fletcher v. Braddick*, 2 Bos. and Pul. N. R. 182.

### PHILP v. SQUIRE.

No action lies for harbouring the Plaintiff's wife where she is kept by the Defendant from a principle of humanity, to secure her from the ill treatment of her husband.

THIS was an action on the case for harbouring the Plaintiff's wife after notice from the Plaintiff not to do so.

It

by the Defendant from a principle of humanity, to secure her from the ill treatment of her husband.

It appeared that the Plaintiff's wife came to the house of the Defendant (to whose wife she was related) and *represented herself* to have been very ill used by her husband, who, she said, had turned her out of doors. Upon this representation the Defendant received her into his house, and, at her request, suffered her to continue there after he had received notice from the husband not to harbour her. It was not proved that the husband had in fact ill treated his wife.

Lord KENYON. The ground of this action is that the Defendant retains the Plaintiff's wife against the \*inclination of her husband, whose behaviour he knows to be proper; or from selfish and criminal motives. But where she is received from principles of humanity the action cannot be supported. If it could, the most dangerous consequences would ensue, for no one would venture to protect a married woman. It is of no consequence whether the wife's representation was true or false. This kind of action materially differs from that for harbouring an apprentice, the ground of the action in that case being the loss of the apprentice's service.

[ \* 83 ]

The Plaintiff was nonsuited (a).

(a) *Vide Winsmore v. Greenbank, Willes, 577.*



Monday,  
August 1st.  
At Guildhall.

ROBERTS and Another, Assignees, &c. v.  
DOXON.

Though a witness cannot give evidence of the particular contents of written accounts, yet he may speak to the general balance without producing them.

THIS was an action of trover brought by the Plaintiffs to recover a quantity of goods which they contended had been delivered to the Defendant by the bankrupt *Cooke* in contemplation of bankruptcy.

The bankrupts were *Cooke* and *Kilner*. *Cooke* was also partner in another house with one *Wilkinson*, and two commissions had issued, one against *Wilkinson* and *Cooke*, the other (under which the Plaintiffs were chosen assignees) against *Cooke* and *Kilner*.

One of the assignees under the commission against *Wilkinson* and *Cooke* was called as a witness, to prove that *Wilkinson* and *Cooke*'s debts, a little time before their bankruptcy, amounted to a much larger sum of \* money than their credits. He produced no papers, but said he collected his information from having inspected their accounts.

[ \* 84 ]

Lord KENYON thought that though he could not state the particulars of the books without producing them, yet that he might speak to the general amount, not by saying that one page was so much and another so much, but what from his general observation he perceived to be the general state of their accounts.

Verdict for the Plaintiff.

ROTHEROE

## ROTHEROE and Others v. ELTON.

*ASSUMPSIT* on a policy of insurance on the Plaintiffs' goods on board the ship *Jesse of Port Glasgow*.

The question in the cause was merely a matter of fact, whether the ship was seaworthy or not.

The Plaintiffs called the owner of the ship as a witness to prove that she was staunch.

*Erskine* objected that he was interested in the event of the cause; he comes to exonerate himself from the action, which the Plaintiffs will have against him if they fail in this action: for the law would imply a warranty on his part that the ship was staunch.

*Gibbs*, for the Plaintiffs, answered that it was determined in the case of *Bent and Baker* (a) that a \* witness was competent in all cases, except where the verdict to be given in the cause would be evidence for or against him, and that the verdict in the present cause could not be evidence in an action by or against the owner.

Lord KENYON. The case of *Bent and Baker* was determined on sound principles, but it was there held that the witness was incompetent, not only in those cases where the verdict in the cause would be evidence for or against him in another

An owner of a ship is not a witness (in an action on an insurance of goods put on board that ship) to prove her seaworthy until released by the Plaintiff.

[ \* 85 ]

(a) 3 Term Rep. 27.

suit,

suit, but also where he was directly interested in the event of the suit. This witness is directly interested in the manner mentioned by Mr. *Erskine*.

The Plaintiff then released the witness, and recovered a verdict (a).

(a) In the cause of *Fox v. Luskington*, tried before his Lordship at *Guildhall*, at the Sittings after *Hilary Term* 35 Geo. 3. a similar objection was made to the deposition of *Barry* the master and sole owner; and no release being offered, his deposition was not read. See also *Salk*, 287. pl. 22. 2 Lord *Raym.* 1007. So in an action for running down a ship, the Defendant's captain or pilot are not competent witnesses for him unless released, *Perry v. Bouchier*, 4 *Camp.* 80. *Aldridge v. Simmons*, *ib.* 392.

# CASES IN K. B.

AT THE SITTINGS

AT NISI PRIUS,

AFTER MICHAELMAS TERM, 32 GEORGE III. 1791.

HALL v. ELLIOT, Executor of ELIZABETH  
CODDON, Widow, who was the Executrix of  
her late Husband PATRICK CODDON, de-  
ceased.

*Tuesday,*  
*Nov. 29,*  
*1791. At*  
*Westminster.*

*ASSUMPSIT* for goods sold and delivered to the  
testator *Patrick Coddon* in his life-time.

A man who  
possesses  
himself of  
the effects of  
the deceased  
under the  
authority,  
and as agent  
for the right-  
ful executor,  
cannot be  
charged as  
executor *de*  
*son tort.*

The Defendant pleaded that the testator *Patrick Coddon* made his will and appointed *Elizabeth Coddon* and *Rowland Conyers*, executrix and executor thereof, that they both proved the will, and afterwards *Elizabeth Coddon* died and that *Rowland Conyers* was still alive. And the Defendant further says, “that he never did, as the executor  
“of the said *Elizabeth Coddon* who was the exe-  
“cutrix of the said *Patrick* as aforesaid, admi-  
“nister any goods or chattels,” &c.

\* The Replication traversed this last averment.

[ • 87 ]

Lord

Lord KENYON stopped the counsel upon the opening of the pleadings, and said he thought this action could not be maintained. Here is a surviving executor who has acted, and he alone is answerable. If the Defendant has possessed himself of any goods, he is answerable to the surviving executor for them, and that executor must distribute them amongst the creditors.

*Wigley*, for the Plaintiff, cited *Read's* case, 5 Co. 33. which he contended shewed that this action might be supported, though he admitted that an action would also lie against the Defendant at the suit of *Conyers* the surviving executor; and Mr. *Bower*, who was also of counsel for the Plaintiff, observing that the objection was on the record, Lord *Kenyon* said he would permit the cause to go on, though he had no doubt in his own mind that the action could not be maintained, as it was impossible there should be a lawful executor, and an executor *de son tort*, at the same time (a).

The cause accordingly proceeded, but *Conyers*, the surviving executor, proving that the Defend-

(a) In the second resolution in *Read's* case it is said, that if an executor is made, and proves the will, and then a stranger takes goods *claiming them for his own*, he is not executor of his own wrong; because *there is another executor* whom the creditor may charge: but although there be an executor who administers, yet if a stranger takes the goods and *claiming to be executor*, pays debts, &c. he may for such *express* administration be charged as executor of his own wrong. The third resolution was that where the Defendant takes the goods *before* the rightful executor hath taken upon him or proved the will, he may be charged as executor of his own wrong.

ant acted \* as agent for him, and accounted with him, for the money he received, the Plaintiff was nonsuited. [\* 88]

## BLACK v. SMITH.

Wednesday,  
November 30.  
At Guildhall.

THIS was an action of *assumpsit* on a special promise to pay the Plaintiff (a mariner) more than the ordinary wages in consideration of his undertaking a voyage from *Hambro'* to *Newcastle*.

The Defendant had pleaded a tender, and paid money into court sufficient to cover the ordinary wages.

It appearing that this promise was extorted from the Defendant by the mutinous conduct of the mariners; this part of the case was given up (a), and the only question was, whether a legal tender had been made. The like promise had been made to the other sailors, as to the Plaintiff, and several of them had also brought actions against the Defendant; but before the commencement of the present action, the Plaintiff and several other sailors being in the same room, the Defendant offered them as much money as was sufficient to pay all the crew their legal wages, but did not distinguish the particular sum due to each. The

If A. be indebted to several persons in different sums of money, and when they are all assembled together, tenders them *one gross sum*, sufficient to satisfy all their demands, which they refuse to receive, *insisting on more being due*, this is a good tender. It is not necessary to produce the money tendered when the creditor insists on more being due.

(a) *Vide Harris v. Watson, ante, 72.*

amount

amount of the whole money offered was about £11, the debt due to the Plaintiff £1. 5s. All the sailors present refused to receive less than the money promised them, and upon hearing this their  
 [\* 89] \* resolution, the Defendant did not produce the money, which he had ready to pay them.

*Garrow*, for the Plaintiff, objected that this was not a good tender; he said this was like the case of a Bank note of £500 being tendered to pay the debt of £100, and the change being demanded. This would surely not be a good tender.

Lord KENYON. This is true in part, though not wholly so. I take it to be clear beyond a doubt, that if the debtor tenders a larger sum of money than is due, and asks for change, this will be a good tender, if the creditor does not object to it *on that account*, but only demands a larger sum. I think that the tender made in this case was a good one; they were told there was enough to pay all, and they objected to receive it, because they wanted more. There is no occasion to produce the money if the creditor refuses to receive it on account of more being due.

Verdict for the Defendant (a).

(a) *Vide Wright v. Reed*, 3 Term Rep. 554. *Douglas v. Patrick*, *ibid.* 689. and *Cole and Another v. Blake*, *post*, 170. In the case of *Dickenson v. Shee*, 4 Esp. Cas. 67, Lord Kenyon is reported to have said there should be an offer to pay, by producing the money, unless the Plaintiff dispenses with the tender by expressly saying, that the Defendant need not produce the money, as he would not accept it; for though the Plaintiff might refuse the money at first, yet if he saw it produced he might be induced to accept it. So in *Thomas v. Evans*, 10 East, 101. the Defendant

Defendant having left 10*l.* with his clerk to pay the Plaintiff, the clerk on the Plaintiff calling and demanding a larger sum, told him that the Defendant had left 10*l.* for him, *but did not offer it*, and the Court held this to be no tender. Mr. J. *Le Blanc* said, "There must either be an actual offer of the money by one party, or a dispensation of such offer by the other."

## WHITE v. EDMUNDS and Others.

Thursday,  
Dec. 1st. At  
Westminster.

## ASSAULT and false imprisonment.

The Defendants justified the imprisonment on account of the Plaintiff having made a noise and affray.

\* It appeared, that one *Weeks* was walking along the *Strand* by the Defendant *Edmunds*' door between 11 and 12 o'clock at night, and there spoke to a woman, who retreated back and claimed the protection of the Defendant *Edmunds*. That *Edmunds* thereupon spoke to *Weeks*, desiring him to walk on and not insult the woman; but he, instead of attending to this desire, answered *Edmunds* with abusive language, calling him scoundrel, &c. and collecting a crowd about his house, on which *Edmunds* charged the watchman with *Weeks*. While the Defendants were conveying *Weeks* to the watch-house, the Plaintiff came up and interested himself in his cause. He, with others, went into the watch-house, and was there some time

If when a man is apprehended, and in the custody of officers of justice, a third person espouses his cause and encourages the prisoner to resist, the officers may imprison such third person.

[ \* 90 ]



time using abusive language to the Defendant *Edmunds*: they at length came to very high words; and the Plaintiff was desired to go out of the watch-house; *Weeks* put his back against the door, and in a riotous manner insisted on his being permitted to stay; and the Plaintiff continuing his abuse, *Edmunds* also charged the other Defendants (who were the watchmen) with him.

Lord KENYON was of opinion, that these facts afforded a sufficient justification of the Defendants' conduct. When a man is in the custody of the officers of justice no other person has a right to interfere. If the Defendants apprehended *Weeks* for a just cause, he should have been left to them, and they not interrupted in the execution of their duty; if he was taken illegally, the officers must answer it at their peril. In the present case the Plaintiff had entered into the cause of *Weeks*; he therefore made himself liable for any misconduct of *Weeks*. *Weeks* himself made a riot by shutting

[ \* 91 ] the door and insisting on the Plaintiff being \* permitted to stay, and the Plaintiff encouraged him in it.

The Jury found a verdict for the Defendants.

## REX v. BARTHOLOMEW NEVILLE.

Friday,  
Dec. 2.

**T**HIS was an indictment for a nuisance in carrying on the business of a melter of kitchen stuff and other grease.

Amongst other evidence, the prosecutor produced a bond from the Defendant to the parish officers of the place where he before resided, acknowledging that the trade he carried on was a nuisance, and binding himself not to continue it. To lay a foundation for this evidence, the prosecutor had before proved, that the trade was carried on in the same manner at the place where he now was, as at his former residence.

*Erskine*, for the Defendant, objected to this evidence. What is a nuisance is a question of law mixed with fact. The Defendant may have acknowledged himself guilty of a crime which the fact would not constitute (*a*), and what may be a nuisance in one place will not be so in another.

LORD KENYON. Certainly what is a nuisance in one situation is not so in another. In places where offensive trades have been long carried on they are not nuisances, though they would be so in any of the \*squares, or other places where such trades have not been exercised. But the Defendant having acknowledged himself guilty of a nuisance in another place, cannot object to this evidence,

A bond given by the Defendant acknowledging himself to be guilty of a nuisance, is good evidence on the trial of an indictment for a nuisance, in carrying on the same business in another place.

A man setting up a noxious business in a neighbourhood where such business has long been carried on, is not indictable for a nuisance, unless the noxious vapour is *much* increased by his manufacture.

[ \* 92 ]

(a) *Vide* 1 Burr. 267.

which

which will weigh more or less against him, as it shall appear this place is more or less like that where he before resided.

The evidence was therefore received.

Upon the whole of the evidence it appeared, that there had been manufactories, which emitted disagreeable and noxious smells, carried on in this neighbourhood for many years; and that the Defendant came into the neighbourhood about four years ago. There was contradictory evidence as to the fact of the stench being much increased by the Defendant's melting house: some of the witnesses for the Crown stating it to have made the neighbourhood much more uncomfortable; those on behalf of the Defendant saying the difference was scarcely perceptible.

Lord KENYON left it to the Jury to consider whether the noxious vapour was much increased by this addition of the Defendant. Where manufactories have been borne with in a neighbourhood for many years, it will operate as a consent of the inhabitants to their being carried on, though the law might have considered them as nuisances, had they been objected to in time; but if another man comes, and, by *his* manufacture, renders that which was a little unpleasant before, very disagreeable and uncomfortable, though it would not amount to a nuisance by itself, still he is answerable for it.

The Defendant was acquitted.

[ \* 93 ]

\* Note. *Samuel Neville*, the brother of the Defendant, was also indicted, but it appearing that the

the manufacture had been carried on near 50 years by the Defendant's father and himself; Lord *Kenyon* directed the Jury to find the Defendant not guilty, which they did.

### LAWRENCE *v.* WORRALL.

To an action of *assumpsit*, the Defendant pleaded the statute of limitations.

The Plaintiff's witness proved, that in the month of *February* last, just after the bill in question was delivered, the Defendant meeting the Plaintiff, said to him, "what an extravagant bill you have delivered me!" on which the Plaintiff offered to refer it to arbitration, which the Defendant refused.

The Defendant saying to the Plaintiff "what an extravagant bill you have delivered me!" is a sufficient acknowledgment to avoid the stat. of limitations.

Lord KENYON held this a sufficient acknowledgment of *some* money being due, to take it out of the statute; and on his Lordship giving this opinion, the parties agreed to refer the *quantum* of damages to arbitration (a).

(a) *Vide Lloyd v. Maund*, 2 T. Rep. 760. where a letter, written in ambiguous terms, neither expressly admitting nor denying the debt, was left to the Jury as an acknowledgment. In *Rucker v. Hannay*, 4 East, 604. n. an affidavit made for the express purpose of obtaining leave to plead the stat. was so left, as was a declaration by the Defendant that he did not owe the Plaintiff a farthing, it being more than six years since he contracted, *Bryan v. Horseman*, 4 East, 599. See also *Leaper v. Tatton*, 16 East, 420. and other cases collected *Peake's Law Evidence*, 291. 4th edit.

LAW

Saturday,  
Dec. 3d.

LAW v. WELLS.

A party is not obliged to produce evidence against himself, though such evidence is in court, and he has had notice to produce it.

[ \* 94 ]

THIS was an action of trover against the Defendant, who, as messenger under a commission of bankrupt, had taken the Plaintiff's goods.

\* The Plaintiff had given the Defendant notice to produce the proceedings under the commission. They were in Court, but the Defendant's counsel refused to produce them (a).

Lord KENYON said they were not obliged to produce them unless they chose, and mentioned a case at *Lancaster*, where Mr. J. Yates, who was the leading counsel in the cause (b), refusing to produce some muniments relating to an election at *Wigan*, the Court held he was not obliged to produce them.

Verdict for Plaintiff.

(a) In *Bateson v. Hartsink*, 4 *Esp. Cus.* 43. Lord Kenyon would not compel the solicitor under a commission of bankruptcy to produce the proceedings when served by a creditor with a *Subpœna duces tecum* to produce them, saying they were the papers of the assignees. But in a similar case Lord *Ellenborough* said, that he considered it a public duty to have the proceedings produced, *Pearson v. Fletcher*, 5 *Esp.* 90. and see *Corsen v. Dubois*, 1 *Holt*, 239. and *Cohen v. Templar*, 2 *Stark.* 260. acc.

(b) From what Mr. J. Yates is reported to have said of this case in 4 *Burr.* 2488, it should seem that he sat as *Judge* on the trial of it; he recognized the decision, in the case of *Roe dem. Haldane and Another v. Harvey*, 4 *Burr.* 2484. though his opinion, in that case, was overruled by that of the other judges; who held that the party ought to produce the deed, though he had not even had notice so to do. But in *Doe d. Wood v.*

*Morris*,

*Morris, 12 East, 237*, the Plaintiff resting his case on the proof of payment of rent, the witness said, on cross-examination, that there was an agreement in writing between the parties, which had been produced on a former trial, and another witness proved that he had seen such agreement in the hands of the Plaintiff's attorney that morning, yet as no notice had been given to produce it, the Court held, that this general evidence was not sufficient to exclude the parol evidence of payment of rent, or rebut the general inference of a tenancy from year to year arising from it.

### ROBINSON v. ANDERTON.

*ASSUMPSIT* for money had and received. The Plaintiff had succeeded the Defendant in a public house, and paid him for some fixtures which belonged to the house, and were scheduled in the original lease, and for which the Plaintiff was afterwards obliged to pay the lessor. The Defendant had been *under-tenant* of the house, and had paid the person of whom he rented it, for these very fixtures. In an action for money had and received to recover back money paid to the Defendant, it is not necessary to shew that he *knew* he was not entitled to receive it.

*Piggot* on behalf of the Defendant, contended that this action could not be maintained. The present \* Defendant had himself paid for these fixtures, and of course thought he was intitled to sell them, and as he did not commit any fraud on the Plaintiff, he cannot in this action be compelled to refund the money.

[ \* 95 ]

Lord KENYON. This action imputes nothing criminal to the Defendant, his title is disaffirmed, for it appears he has received money which he had no right to, and which he must therefore return.

K

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He may recover back the money from the person to whom he paid it, and perhaps tack the costs of this judgment to it.

Verdict for the Plaintiff (a).

(a) *Vide Bree v. Holbeck*, Dougl. 630.

### CARTER v. PRYKE.

In a question between landlord and tenant whether rent was payable quarterly or half-yearly, evidence of the mode in which other tenants paid is not admissible.

*ASSUMPSIT* for use and occupation. The Defendant pleaded a tender.

The only question in the cause was, whether the rent was payable quarterly or half-yearly? If the former, the sum tendered was not sufficient to answer the Plaintiff's demand.

The Plaintiff offered evidence that his other tenants, of the same description as the Defendant, (who was in indigent circumstances) paid their rents quarterly.

Lord KENYON. This is clearly no evidence in this cause; it has been solemnly determined in a trial at bar, that evidence of the custom of one manor is \* no evidence of the custom of a manor adjoining (a).

[ \* 96 ]

The Plaintiff produced other evidence and obtained a verdict.

(a) See also *Furneux v. Hutchins*, Cowp. 807. *Duke of Somerset v. France*, 1 Str. 654. *Peake's Evid.* [197] 210.

FELL

## FELL v. BROWN, Esq.

Monday,  
Decem. 5th.

THIS was an action against the Defendant, a barrister, for unskilfully and negligently settling and signing a bill filed by the Plaintiff in the Court of *Chancery*, which bill was referred by the *Lord Chancellor* to the *Master*, for scandal and impertinence, and the Plaintiff obliged to pay the costs of that reference.

No action  
lies against  
a barrister  
for misconduct.

*Erskine*, for the Plaintiff, in his address to the Jury said, that he should prove this to be *crassa negligentia*, and not a mere error in judgment. If a counsel gives his opinion on any question, and happens to be mistaken, it cannot be said that he has been guilty of gross negligence; but if he is so inattentive to his duty as to blunder in the common course of business, he makes himself liable to an action, as would also a physician for such gross misconduct.

Lord KENYON was clearly of opinion, that this action could not be supported. More objections than one, his Lordship said, might be made to it. The Court of *Chancery* will in such cases exert a summary power, if it is found expedient so to do (a); but if that Court will order the counsel to pay the costs, it does not follow that an action can be maintained. \* If this action could be supported, it would equally lie against a counsel for

[ \* 97 ]

(a) *Rules and Orders of Chancery* 93. *Mitford's Pleadings* 47.



inserting a count in a declaration, or putting matter in a plea which ought not to be there, and which the Court should think improper and impertinent. In a case (*a*) where Lord *Weymouth* was a Defendant, the Court thought the declaration full of unnecessary matter, and ordered it to be struck out, with costs, but no one ever entertained an idea that an action could be maintained against the counsel who drew that declaration. His Lordship added, that he believed this action was the first, and hoped it would be the last, of the kind.

On this opinion, the cause was given up, and the Plaintiff nonsuited without one witness being examined; but his Lordship told the Plaintiff's counsel he would take a note of the cause, that they might move for a new trial, if they thought proper (*b*).

(*a*) *Cowp.* 665. *ibid.* 737.

(*b*) *Vide Chorley v. Balcot*, 4 *T. Rep.* 317. and *Turner v. Phillips*, *post*, 122. *Sed. vide* 1 *Roll. Abr.* 10. 91. where several cases are collected on this subject.

*Tuesday,*  
*Dec. 6th.*

### DUBERLY *v.* GUNNING.

The Court will put off the trial on the affidavit of the Defendant's attorney that a material witness is kept out of the way by the Plaintiff.

THIS was an action for criminal conversation with the Plaintiff's wife.

The cause stood in the paper for trial this day, and

material witness is kept out of the way by the Plaintiff.

and a motion was made by *Bearcroft* for the Defendant to put off the trial on an affidavit, stating a suspicion that two of the Defendant's witnesses were kept out of the way by the Plaintiff. The affidavit was made by the Defendant's attorney, who swore that he \*believed the witnesses were material and necessary for the Defendant's defence. [ \* 98 ]

*Erskine*, for the Plaintiff said, that had the question between the parties been a matter of title, which might be purely a question of law, the affidavit of the attorney would have been sufficient; but that in a case like the present, which must be entirely a question of fact, the Defendant himself should swear to the materiality of the witnesses.

LORD KENYON. I think this affidavit is sufficient. There was once a case (*a*) where on a question of identity, on an attainder of high treason, the Court, before they would put off the trial, required the Defendant to swear that he was not the same person. How far that case was relished at the time the public opinion of it since has shewn. It has never since been considered as a precedent, or at all acted under.

The trial was put off (*b*).

(*a*) Mr. *Charles Radcliffe's* case, *Fost. Rep.* 40. 1 *Black Rep.* 3.

(*b*) In *Sullivan v. Magill*, 1. H. Black. 637. the Court said they would not put off the trial on the affidavit of the attorney's clerk, unless it appeared that he had the management of the cause.

Friday, December 9th.  
At Guildhall.

# NEW v. CHIDGEY.

A person about whose house work has been done by the Plaintiff, is not a good witness to prove that the Defendant is liable, until she is released.

*ASSUMPSIT* for work and labour done and performed for the Defendant.

The Plaintiff was a paper-hanger, and had done work in the house of a lady of the name of *Le Pein*. She had employed the Defendant, and the question between the parties was, whether the Plaintiff had done this work on the credit of the Defendant, or was to look to Mrs. *Le Pein* for payment of his bill.

[ \* 99 ]

\* The Plaintiff proposed calling Mrs. *Le Pein* to prove that she had employed the Defendant to do the repairs of her house for a certain sum, and that he was to do all the work, and pay all the persons employed by him, amongst whom was the Plaintiff.

*Erskine* contended she was an admissible and competent witness. She had no interest in the event of the cause. If a verdict was given for the Plaintiff, on her evidence, she would not be discharged, for she was still liable to an action at the suit of the Defendant for money paid to her use; and her evidence in this cause, or the record in it, would not be evidence for her in that cause: she would therefore still be liable to pay the money.

Lord KENYON thought this a direct interest in the event of the cause. His Lordship said he would never wish to depart from the rule laid down in

in *Bent* and *Baker* (a), that case was determined upon good consideration and upon true principles, but this did not come within it.

The Plaintiff then released and examined Mrs. *Le Pein*, and on her evidence obtained a verdict (b).

(a) 3 Term Rep. 27. Vide *Peake's Evidence* [171] 188. and *M'Brain v. Fortune*, 3 Campb. 317.

(b) Vide *Peake's Evid.* [171] 180.



### HOLMES v. PONTIN.

Monday,  
Dec. 12th.  
At Guildhall.

*ASSUMPSIT* for use and occupation. The defence was that the Plaintiff had mortgaged the premises, and that the mortgagee had given the Defendant notice to pay his rent to him.

\* The execution of a lease, part of the mortgagee's title, was attested by *Gwillando* and *Smith*, the former was master of an hotel at *Calais*, the other his waiter.

Where a subscribing witness is resident abroad, evidence of his hand-writing is to be given as if he were dead.

[ \* 100 ]

The clerk to the Defendant's attorney proved, that he had been to *Calais*, and endeavoured to persuade *Gwillando* to come to *England* and give evidence of the execution of the deed; which he refused to do. The witness then requested him to write his name, which he did in his presence, and he now swore that from his observation of his hand-writing at that time, he believed the name

*Gwillando*,

*Gwillando*, subscribed to the deed as a witness of the execution, was his hand-writing. He further proved that he had enquired after *Smith* the other witness, and was told by his father-in-law and several other persons that he was dead.

*Mingay*, for the Plaintiff, objected that this was no legal proof of the deed.

LORD KENYON. When a party is out of the reach of the process of the Court, I think evidence may be given of his hand-writing as if he were dead. This rule was first laid down by Lord *Mansfield* in a case (*a*) where the subscribing witness was gone to the *East Indies*: it was considered as an innovation at the time, but was found to be so beneficial that it has since been adhered to, and I am inclined to follow it in the present instance.

The lease was therefore read, and a mortgage and assignment of it proved, on which the Plaintiff was nonsuited (*b*).

(*a*) *Coghlan v. Williamson*, Dougl. 89.

(*b*) *Vide Barnes v. Trompowsky*, 7 T. Rep. 265. *Adams v. Kerr*, 1 Bos. and Pul. 360. and *Prince v. Blackburn*, 2 East. 250. In the latter case the witness was not gone to reside out of the kingdom, but merely on a voyage to *America*, and yet it was held sufficient to prove his hand-writing. In *Wallis and Delancy*, cited 7 T. Rep. 266. Lord *Kenyon* held at N. P. that in such cases the Plaintiff should also prove the hand-writing of the obligor, but this was not urged in either of the other cases. In *Hodnett v. Forman*, 1 Stark. 90. Lord *Ellenborough*, on the authority of *Prince* and *Blackburn*, permitted the hand-writing of an attesting witness, who resided in *Ireland*, to be proved, though no steps had been taken to procure his personal attendance.

\* Note. Another deed was also proved, to which [ \* 101 ] the Plaintiff was a party, and wherein this lease was recited; but Lord *Kenyon* said that without that circumstance he should have thought the other evidence sufficient.

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## LAY v. HOLOCK.

THIS was an action of *assumpsit* against the Defendant (who was owner of a vessel) for negligently suffering corn, sent by his vessel to *London*, to be injured.

In an action against the owner for not safely carrying corn put on board his vessel, the captain is a good witness for the Plaintiff.

The Plaintiff called the master to prove that the injury which the corn had received was occasioned by the vessel not being sea worthy. The Plaintiff had released this witness.

*Mingay*, for the Defendant, objected to him as an incompetent witness; if he proved the accident to have happened by the cause alledged by the Plaintiff, he exonerated himself from any liability; whereas if it should turn out that the barge was lost by the negligence of the master, he would be liable to an action at the suit of the Defendant.

LORD KENYON. He has no immediate interest: the record in this cause would not be evidence for or against him in an action brought against him; and if it should turn out that the ship was lost by the negligence of the master, still the present Defendant

Defendant is liable to the Plaintiff. Therefore, taking it either way, he is a witness (a).

[ \* 102 ] \* His evidence was received, but many witnesses proving that the vessel perished by the perils of the seas, and not on account of any defect, a verdict was given for the Defendant.

(a) *Vide Spitty v. Bowen, ante, 58.*

Tuesday,  
Dec. 13th.

### MILLER one, &c. v. TOWERS.

An attorney cannot maintain an action even for the money out of pocket in a cause until he has delivered a bill signed.

*ASSUMPSIT* on an attorney's bill, and for money paid to the Defendant's use. The Defendant employed the Plaintiff to bring an action on a wager. At the trial of that cause, Lord *Kenyon* thought the wager an illegal one, and nonsuited the Plaintiff. The Defendant complaining of the hardship of his case, the present Plaintiff agreed to take the costs out of pocket, and brought this action without ever delivering a bill.

*Erskine*, for the Plaintiff, contended that he might give this in evidence under the count for money paid.

LORD KENYON. I am clearly of opinion he cannot; if it were so, many beneficial consequences of the act of parliament might be avoided, for by agreeing to take the costs out of pocket, the attorney

torney might always prevent a nonsuit when the objection was made.

The Plaintiff proved some conveyancing business, but the Defendant having a set-off to a larger amount, the Plaintiff was called (a).

(a) The words of the stat. 2 Geo. 2. c. 23. s. 23. are, that no attorney or solicitor shall commence or maintain any action, suit for the recovery of any fees, charges, or disbursements at law, or in equity, until, &c. See the several cases on this subject collected *Peake's Evid.* [245.] 262.

\* PEPPER v. BURLAND.

[ \* 103 ]

*ASSUMPSIT* for work and labour as a carpenter.

The Defendant proved that the Plaintiff contracted to do all the carpenter's work necessary to be done in a house which the Defendant was building, for a certain sum. It was admitted that the roof of the house had been done in a manner different from that specified in the contract, and the Defendant had paid money into court sufficient to cover the excess.

A plan was produced, and proved by the Plaintiff, wherein the dimensions of the house were stated to be 15 feet; but the house on which the work was done was 17 feet. It did not appear that the Plaintiff had ever seen this plan before he began

Where a builder agrees to erect any building for a particular sum of money, and additions are made, the builder is bound by the contract as far as it can be traced, and entitled to go on a *quantum meruit* for the excess only.



began to work ; but the house was begun by the bricklayer on the scale of 17 feet, before any contract was made with the Plaintiff.

Lord KENYON. I have often declared, and have had the good fortune to have my opinion adopted by Juries, that where some additions are made to a building which the workman contracts to finish for a certain sum of money, the contract shall exist, as far as it can be traced to have been followed, and the excess only paid for according to the usual rate of charging. I think that the Plaintiff has failed in shewing the plan by which he contracted to work to be the same as that produced. I admit that if a man contracts to work by a certain plan, and that plan is so entirely abandoned that it is impossible to trace the contract, and say to what part of it the work shall be applied, in such case the workman shall be permitted to charge

[ \* 104 ] \* for the whole work done by measure and value, as if no contract at all had ever been made ; but in the present case the contract is not proved to have been wholly abandoned, for it appears that the dimensions were the same when the Plaintiff contracted as they were when the building was finished ; the only excess was in the alteration of the roof, and money enough to cover that has been paid by the Defendant into Court.

Verdict for the Defendant (a).

(a) *Vide Ellis v. Hamlin*, 3 Taunt. 52. *Dunn v. Body*, 1 Stark. 220. *Robson v. Godfrey*, 1 Stark. 275. 1 Holt. 236. S. C.

## REX v. D'FARIA.

*Monday,  
Dec. 19th.  
At Guildhall.*

THE Defendant was indicted for perjury committed in an answer to an allegation in the Prerogative Court of *Canterbury*. The allegation, in answer to which the perjury was committed, was exhibited for the purpose of revoking the probate of a will of one *De Sylva* made in favour of the Defendant, and obtaining probate of a subsequent will. The case stated on the part of the Plaintiff in that suit was, that the Defendant had, after the testator's decease, called on the executrix, named in the last will for the purpose, as he said, of reading it; and had then cut off the name and seal of the testator with a pair of scissars, and torn off the names of the subscribing witnesses. This case the Defendant denied by his answer, but on examination of witnesses, the Court decreed in favour of the executrix, which decree was affirmed on an appeal to the Delegates.

A party to a suit who has succeeded therein, is a good witness on an indictment for perjury committed in the course of that suit.

\* Amongst other witnesses in support of the prosecution, the widow, who was executrix and residuary legatee in the last will, was called; and on an objection being made to her competency, [ \* 105 ]

Lord KENYON said, she had now no interest in the event of this prosecution, the ecclesiastical court having decreed in her favour, and established the will under which she claimed. It was true that the Crown might grant a commission of review in case the present Defendant was acquitted  
on

on the merits, but no objection could be made to her testimony on that account, for if such a commission was to be granted the present witness could not be examined on that cause.

The Defendant was convicted (a).

(a) *Vide Rex v. Dalby, ante, 12. and Rex v. Pepys, post, 138.* It is now clearly settled that as the record could not be given in evidence, for the party injured by the perjury, he is a witness, *vide ante, 13. note (a).*

# C A S E S I N K. B.

AT THE SITTINGS

AT NISI PRIUS,

AFTER HILARY TERM, 32 GEORGE III. 1792.

CLEVELAND Esq. v. WILSON, Esq.

*Wednesday,  
Feb. 22d. At  
Westminster.*

THIS was an action of debt, on the stat. 28 Geo. 3. c. 52. for the costs of a frivolous petition, preferred by the Defendant against the Plaintiff's election as a member to serve in parliament.

The Plaintiff proved the Speaker's certificate, and a copy of the entry on the journals of the House of Commons, of the resolution of the select committee.

*Bearcroft* for the Defendant objected, that the Plaintiff had not thereby made out his case. He contended, that it was incumbent on him to prove that the Defendant had signed the petition, and that the money had been personally demanded of him.

Lord KENYON thought sufficient evidence had been given. The petition must have been subscribed

In an action for the costs of a frivolous petition against the election of a member of parliament, it is not necessary to prove either the Defendant's subscription of the petition, or a demand of the costs previous to the commencement of the action.

scribed before it would be received (a); and the commencement of the action was a sufficient demand.

But to remove all doubt, the Plaintiff proved a demand, and on that evidence obtained a verdict (b).

(a) See the act, § 23.

(b) *Vide Trueman v. Lambert*, 4 M. and S. 234. in which the Court held, that if the petition charge the returning officer with corruption, and he attend before the committee, and bring witnesses in his defence; and the committee report the charge to be frivolous and vexatious, which resolution is entered on the Journals, the returning officer may, on obtaining the Speaker's order and certificate, maintain an action of debt on the statute.

Thursday,  
Feb. 23d.  
At Guildhall.

### STORT v. CLEMENTS.

A pilot who has the steering of a ship is liable to an action for an injury done by his personal misconduct although a superior officer is on board.

THIS action on the case was brought against the Defendant for running down a brig belonging to the Plaintiff. The brig was run down by a tender, of which the Defendant was pilot and master.

By the commission of the master, he is entrusted with the navigation of the ship under the command of his superior officer.

A witness proved that the constant practice in the navy was to leave the navigation of the ship entirely to the direction and care of the pilot; but he added that if the commanding officer were

to

to direct the pilot to do any particular act, he must obey.

*Erskine*, for the Defendant, contended that the action was misconceived, and that if any person was liable to an action, it must be the lieutenant who was on board, and under whose orders the Defendant was.

Lord KENYON said, that though he might be obliged to act in obedience to the orders of the lieutenant, yet if in the present case the accident had \* happened through the *Defendant's* misconduct, *he* was answerable. [ \* 108 ]

The next witness proved that the lieutenant had commanded the Defendant to steer the ship in a particular manner, in consequence of which command the mischief was done. Whereupon the Plaintiff was nonsuited (*a*).

(*a*) See *Fletcher and Others v. Broddick and Others*, 2 Bos. and Pul. N. R. 183, where an action for running down the Plaintiff's ship was brought against the owners of a ship which was chartered to the commissioners of the navy. It appeared that by the terms of the charter-party, the Defendants were to provide thirty-six men and two boys for the vessel, and also a surgeon, &c. but the master should observe and execute all orders which he should receive from the officer who should be commissioned to command the vessel. At the time the injury happened, a master in the navy, who had been put on board by the admiralty, and also a King's pilot, were on board, and the latter acted as such, and gave orders to the seamen. It was contended that on this account the Defendants were not liable; but the Court, after consideration, determined that the owners still remained liable. *Mansfield*, C. J. in delivering the opinion of the Court, said, "The true justice of the case is, that if an injury happens through the misconduct of the master and

L

" crew,

“ crew, the owners should be liable, but if by the misconduct of  
 “ the officers, that the officers should be liable. But how is a  
 “ third person to ascertain the fact ? There is a provision in the  
 “ charter-party that if the injury does not happen by the fault  
 “ of the master or the crew, the crown shall make satisfaction,  
 “ and this is very reasonable between the crown and the owners.  
 “ Referring the adjustment to the true cause, they can enquire  
 “ into the matter between themselves ; but it is impossible for  
 “ any third person who receives damage, to enquire whether it  
 “ arose from the act of the master and crew, or of the officer.  
 “ On the whole it appears to the Court, that this ship, notwith-  
 “ standing it had an officer on board, is, with regard to third  
 “ persons, to be considered as the ship of the owners ; and that  
 “ they are therefore answerable for damage done by their ship.”  
 In *Nicholson v. Mounsey*, 15 *East* 384, the Court held, that the  
 captain of a sloop of war was not answerable for damage done  
 by her running down another vessel, the mischief appearing to  
 have been done during the watch of the lieutenant, who was  
 upon deck, and had the actual direction and management of the  
 steering and navigating of the sloop at the time, and when the  
 captain was not upon deck, nor was called by his duty to be  
 there. In *Stone against Cartwright and Another*, 6 *T. Rep.* 411,  
 the Court held that for an injury done to the Plaintiff's house by  
 the negligent working of a colliery, either the owner of the col-  
 liery, or the person actually negligent, might be sued ; but that  
 a mere steward, manager, or agent, was not liable.

*Saturday,*  
*Feb. 25th. At*  
*Westminster.*

### DUFFIN v. SMITH.

An attorney  
 who pre-  
 pares deeds  
 which are  
 granted on  
 an usurious  
 considera-  
 tion, may be  
 called as a  
 witness to prove the usury.

**D**EBT on bond conditioned for the payment of  
 £400. and interest.

The Defendant pleaded that the bond was given  
 on an usurious contract.

The

The Defendant called the Plaintiff's attorney as a witness, to prove that the consideration on which this bond and the mortgage which accompanied it, were given, was usurious.

It was objected by the Plaintiff's counsel that this was a case of confidence, and he could not be examined.

Lord KENYON. The privilege does not extend so far as this case. Where any thing is communicated to an attorney by his client for the purpose of his defence, he ought not to divulge it; but where he himself is, ~~as~~ it were, a party to the original transaction, *that* does not come to his knowledge in the character of an attorney, and he is liable to be examined the same as any other person.

*Mingay*, as *amicus curiæ*, mentioned a case of (a) *v. Brest*, at *Guildhall*, where Mr. *Taylor*, who was attorney \* for one of the parties, was compelled to prove what passed at the time of the execution of the deeds; but said he believed the objection was not taken in that case. [\* 109]

Mr. *Holdsworth*, the Plaintiff's attorney, was then examined, and he clearly proving the usury, the Plaintiff was called (b).

(a) Probably *Scott, qui tam, v. Brest*, reported 2 *Term Rep.* 238.

(b) *Vide Du Barré v. Livette, ante, 77. Bull. N. P. 284. acc.* But see an anonymous case in 1 *Lord Raym.* 733. where Lord *Holt* refused to permit one who had been privately entrusted to make an illegal bargain, to be examined as a witness.



BEAUCHAMP *v.* BORRET.

Where an annuity is rescinded after it has been paid for some time, the purchaser is intitled to receive back his whole purchase-money.

*ASSUMPSIT* for money had and received.

The Plaintiff having purchased an annuity of the Defendant, which was void on account of the deeds not being inrolled, it was agreed, after two yearly payments had been made, that the annuity should be rescinded; and that the Defendant should pay to the Plaintiff the money paid for the purchase of the annuity, with interest from the last yearly payment. The sum paid for the purchase was £600. The annuity was £100 *per annum*.

The only question in the cause was, whether under this agreement (which was contained in a letter from the Defendant) the Plaintiff was intitled to recover the whole £600, with interest from the time of the last payment, or whether the £200, which had been paid, should be deducted.

LORD KENYON was of opinion that both under the agreement and according to the justice of the case, the Plaintiff was intitled to recover the whole £600 and interest, from the time the annuity ceased, and the Jury gave damages accordingly (a).

(a) This case was overruled in *Hicks v. Hicks*, 3 East, 16. See also 5 *Vez. jun.* 608. &c. to the same effect. But in *Burden v. Browning*, 1 Taunt. 520. the Ch. J. *Mansfield* expressed his surprise that money paid as an annuity, *eo nomine*, had been considered as payment of principal and interest, adding, that if it were *res integra*, it would most probably be held differently.

In that case, however, it was held that the grantee could not be allowed money paid by him for insurance of the life of the grantor; but it was not decided whether he would be liable to refund in case of an over-payment of principal and interest.

\* FALLON v. ANDERSON.

[ \* 110 ]

Monday, February 27th.  
At Westminster.

TRESPASS for breaking and entering the Plaintiff's house, seizing goods, &c.

The Defendant justified under a writ of *distringas* against one *Staples*, and the Plaintiff replied in the general way, without making any new assignment.

On the evidence, it appeared that *Staples* had sold goods to the value of those in dispute to the Plaintiff, which sale could not be impeached, though the Defendant attempted to shew it was fraudulent. It was also proved that *Staples* had let the shop in which the goods in question were; and some other rooms in the house, to the Plaintiff; and that goods belonging to *Staples*, which were in a different part of the house, were seized by the Defendant at the time the trespass complained of was committed.

*Wigley*, for the Defendant, contended, that, as to the trespass for breaking and entering the house, the Defendant must have a verdict; for he had shewn a sufficient title to enter under the *distringas* against the goods of *Staples*; and if he also entered

If *A.* be in possession of part of a house, and *B.* of the other part, and an officer enter into *A.*'s part under a writ against *B.*'s goods, which are not there, *A.* may maintain an action against the officer for breaking and entering his house, and need not make any new assignment to a justification under the writ against *B.*

to

to seize the goods of the Plaintiff, it ought to have been newly assigned.

Lord KENYON. By the *house* mentioned in the pleadings, we must understand the shop and other part of the house in the Plaintiff's possession, that was his *domus mansionalis*, and the goods of *Staples* not being *there*, but in another part of the house, afford no justification of the Defendant's conduct in entering that part, and no new assignment is necessary.

Verdict for Plaintiff, damages £20. (a).

(a) *Vide* 3 *Inst.* 65. and *Hale's Hist. P. C.* 556. accord', but see also *Lee v. Gansel, Corp.* 1.

[ \* 111 ]      \* HARRISON v. WALKER and Another,  
Assignees, &c.

*Tuesday,*  
*Feb. 28th.*  
*At Guildhall.*

If *A.* fraudulently procure a bill of exchange from *B.* and afterwards become bankrupt, and his assignees receive the money for the bill, *B.* may recover it from them in an action for money had and received. **THIS** action, for money had and received, was brought to recover back a sum of £190. 10s. which had been received by the Defendants in payment of bills remitted by the Plaintiff to the bankrupts under the following circumstances.

The bankrupts, previous to their bankruptcy, had sent a bill of £193. 17s. drawn by themselves on one *Dawson*, and purporting to be accepted by him, to the Plaintiff to be discounted. The Plaintiff, on the 10th of *November*, sent bills in return to the value of £190. 10s. which arrived in town on the 12th, on which day one of the bankrupts absconded,

absconded, the other having gone off on the 10th. It was afterwards discovered that the acceptance was a forgery, which the bankrupts knew of, and it was proved that the Defendants had received the money for the bills sent by the Plaintiff.

Lord KENYON. The assignment under the commission passes only such property as the bankrupt is conscientiously intitled to. In this case the Plaintiff had received no consideration whatever for the bills by him remitted to the bankrupt; and he is intitled to have the value of them, which the Defendants received, returned to him.

The Plaintiff had a verdict (a).

(a) So where S. obtained bills of exchange from the Defendant upon a fraudulent representation, that a security given by him to the Defendant (which was void,) was an ample security, and on the next day, having resolved to stop payment, informed the Defendant that he had repented of what he had done, and had sent express to stop the bills, and would return them, and three days afterwards committed an act of bankruptcy; after which he returned to the Defendant all the bills (except one which had been discounted), and also two bank notes, part of the proceeds of such discount, and the Defendant delivered back the security, and afterwards a commission of bankruptcy issued against S., the assignees under which commission brought trover against the Defendant for the bills and bank notes. The Court of K. B. held, that the Defendant was entitled to retain them. *Gladstone v. Hadwen*, 1 M. and S. 517. So where a draft for money was entrusted to a broker to buy exchequer bills for his principal, and the broker received the money and misapplied it, by purchasing American stock and bullion, intending to abscond with it and go to America, and did accordingly abscond, but was taken before he quitted England, and thereupon surrendered to the principal the securities for the American stock and the bullion, who sold the whole, and received the proceeds.

The

The Court of *K. B.* held, that the principal was entitled to withhold the proceeds from the assignees of the broker, who became bankrupt on the day on which he so received and misapplied the money. *Taylor v. Plumer*, 3 *M. and S.* 562.

[ \* 112 ]

Wednesday,  
February  
29th. At  
Guildhall.

\* REX v. MICHAEL SCHOOLE.

An indictment for perjury, stating a bill of *Middlesex* to have issued out of the office of the chief clerk of the Court of King's Bench, is bad.

THIS was an indictment for perjury, alledged to have been committed in an affidavit of debt to hold the prosecutor (*Liscombe Price*) to bail for £250.

The indictment stated the affidavit to have been made before *Booth Braithwaite* (the Signer of the bills of *Middlesex*) to the intent "that the sum of £250. might be indorsed upon a certain precept "called a Bill of *Middlesex*, issuing out of the "office of the Chief Clerk assigned to inroll Pleas, "in the Court of our Lord the King before the "King himself."

Mr. *Braithwaite* was called to prove the swearing of the affidavit; and on his cross examination he said, that he was appointed by the three puisne Judges of this Court; and that his was the only office out of which Bills of *Middlesex* issued. That this office was quite distinct from, and unconnected with, the *King's Bench* office, or office of the Chief Clerk.

Upon this, *Shepherd*, for the Defendant, made  
two

two objections. 1st, That there was a material variance between the record and the evidence.

2dly, That taking the fact to be as stated by this record; the person who administered the oath had no authority to administer it, and it was a mere voluntary affidavit.

As to the first objection, he said, that by the testimony of the witness it plainly appeared that the writ did not issue out of the *King's Bench* office as stated in the record. But, 2dly, if the record must be taken to be true, it then appeared that *Braithwaite* had no \*jurisdiction, for the act of the 12 Geo. 1. c. 29. directs the affidavit to be made before a Judge of the Court out of which the process issues; a commissioner duly authorized to take affidavits therein, *or the officer issuing the process or his deputy*, neither of whom had administered the oath in this view of the case; for *Braithwaite* had said, he had no connection with the chief clerk, out of whose office the precept was stated to have issued. [ \* 113 ]

*Erskine* and *Garrow*, for the prosecutor, answered, that the words "the office of the chief clerk assigned to inroll Pleas," were mere surplusage, and being rejected, all would stand right. That every court would take judicial notice of its own proceedings, and therefore it must appear that the precept issued out of the proper office, and that the affidavit was sworn before a proper officer; for this is a process known to the law, and the witness has proved that in fact it was regularly sued out. That the court would see it could not regularly

regularly issue from the office of the chief clerk ; but the *substance* of the allegation, namely, that that affidavit was made to the intent that a *Bill of Middlesex* might issue, was well proved, and that was sufficient.

Lord KENYON. I am of opinion it would not have been necessary to state out of what office the Bill of *Middlesex* was to issue (a), but the prosecutor having stated it to have issued out of a wrong office furnishes a fatal objection. It is impossible for me, sitting here, to say that there is not another office out of which \* these precepts issue. I must take it to be as stated by the record, which is quite a different proceeding from that proved in evidence. However I will not stop the cause, but save the point, if the prosecutor's counsel seriously think they can get over the objection.

The prosecutor's counsel were so well satisfied of the force of the objection, that, on consulting together, they consented to an acquittal (b).

(a) It is not usual to do so. See *Dogherty's Cro. Cir. Assist.* 476.

(b) *Vide Regina v. Denman*, 2 Lord Raym. 1221. *Woodford v. Ashley*, 11 East, 508. *Impey v. Taylor*, 1 M. and S. 166. *Res v. Roper*, 1 Stark. 518.

## CAILIFF and Another v. DANVERS.

Thursday,  
March 1st.

*ASSUMPSIT* against the Defendant as a warehouseman, for negligently keeping a quantity of *ginseng*, which had been deposited by the Plaintiffs in his warehouse; whereby it had been destroyed and spoiled.

A warehouseman is only bound to take reasonable and common care of any commodity entrusted to his charge.

It appeared that the box containing the *ginseng* had been opened, by the Plaintiffs' directions, for the purpose of shewing it to persons who were about to purchase it. That several persons looked at it on different days, and every night the lid of the box was shut down, but not nailed. That many cats were kept in the warehouse, and all possible care taken to destroy vermin, notwithstanding which the rats had got at the *ginseng*, and destroyed it.

Lord KENYON said, that a warehouseman was only obliged to exert reasonable diligence in taking care of the things deposited in his warehouse. That he was not, like a carrier, to be considered as an insurer, and liable for all losses happening otherwise than by \*the act of God or the King's enemies; and that the Defendant in the present case, having exerted all due and common diligence for the preservation of the commodity, was not liable to any action for this damage, which he could not prevent. [ \* 115 ]

The Plaintiff was nonsuited (a).

(a) *Vide Garside v. The Proprietors of the Trent and Mersey Navigation,*



*Navigation*, 4 Term Rep. 581. where the Defendants being common carriers from *Stourport* to *Manchester*, were employed to carry hops from *S.* to *M.* to be forwarded from thence to *Stockport*. They carried them safe to *M.* and then put them in their own warehouse, in which they were destroyed by an accidental fire, before they had an opportunity of forwarding them to *Stockport*. The Court held that they were to be considered as warehousemen only, and therefore not liable; but in a subsequent case of *Hide* against *The same Company*, 5 T. Rep. 389, where the Plaintiff resided at *Manchester*, and it appeared that the Defendants charged for cartage of the goods from the warehouse to the Plaintiff's house, as well as for the carriage of them on the canal, the Defendants were considered liable for the loss arising from the same fire; though it was also proved that the warehouse belonged to the Duke of *Bridgewater*, that a warehouse rent was paid to him, and the cartage allowed by the Defendants to a third person with the knowledge of the Plaintiff. This case contains some important observations on the liability of carriers. Lord *Kenyon* held, that had it not been for the charge for cartage, the Defendants would have been discharged from their duty as carriers on delivery of the goods at the warehouse; but *Ashurst* and *Buller*, J. thought that carriers remained liable in all cases till the goods were actually delivered to the consignee.

Friday,  
March 2d.

MELLISH and Another v. MOTTEUX and  
Others.

The seller of a ship is bound to disclose to the buyer all latent defects known to him.

THE first count of this declaration stated, that in consideration the Plaintiffs would buy of the Defendants a Brig, together with all the rigging, &c. belonging thereto; the Defendants undertook and promised the Plaintiffs that the Brig was free from all latent and concealed defects. The count then stated,

stated, that she was not free from latent and concealed defects, and that the Defendants at the time of the promise *well knew the same*.

It was proved, that the Plaintiffs bought the Brig “*with all faults*,” and not a word was said at the time as to her condition; but that on examination, and taking out the ballast, it was discovered that 22 of her futtocks were broken, and that had she gone to sea in that condition, her destruction would have been the inevitable consequence. That this was a *latent* defect, which it was impossible for any person to have discovered in the state the ship was at the \* time of the purchase, and that [ \* 116] *the Defendants knew of it*.

*Bearcroft*, for the Defendants, objected that this was a case where the rule *caveat emptor* applied, that the Plaintiffs bought the Brig for better for worse, and could not now get off their bargain.

LORD KENYON. There are certain moral duties which philosophers have called duties of imperfect obligation, such as benevolence to the poor, and many others, which courts of law do not enforce. But in contracts of all kinds, it is of the highest importance that courts of law should compel the observance of honesty and good faith. This was a latent defect which the Plaintiffs could not, by any attention whatever, possibly discover, and which the Defendants knowing of, ought to have disclosed to the Plaintiffs. The terms to which the Plaintiffs acceded, of taking the ship with all faults and without warranty, must be understood to relate only to those faults which the Plaintiffs could

could have discovered, or which the Defendants were unacquainted with.

Verdict for the Plaintiffs (a).

(a) In *Baglehole v. Walters*, 3 Camp. 154. Lord Ellenborough, C. J. dissented from this case, and held that if a ship be sold *with all faults*, the seller is not liable to an action in respect of latent defects which he knew of without disclosing at the time of the sale, unless he used some artifice to conceal them from the purchaser. The case of *Baglehole v. Walters* was recognised and acted upon by the Court of C. P. in *Pickering v. Dawson*, 4 Taunt. 779. In *Schneider v. Heath*, 3 Camp. 506. Sir J. Mansfield, C. J. held, that the vendor could not avail himself of a similar stipulation if he knew of secret defects in her, and used means to prevent the purchaser from discovering them, or made a fraudulent representation of her condition at the time of the sale; and *Vide Parkinson v. Lee*, 2 East, 314. *Arnot v. Biscoe*, 1 Ves. 95. *Puffendorf*, L. 5. c. 3. s. 2. 4, 5. *Grotius*, L. 2. c. 12. s. 9.

# CASES IN K. B.

AT THE SITTINGS

AT NISI PRIUS,

AFTER EASTER TERM, 32 GEORGE III. 1792.

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ADAMS v. LINGARD and Another.

Tuesday,  
May 22d.  
At Guildhall.

*ASSUMPSIT* on several bills of exchange by the indorsee, against the acceptor.

The bills were dated at *Madeira*, and not stamped. The Defendants called *Carter* the drawer and indorser, to prove, that, though dated at *Madeira*, they were in fact drawn in *London*, and therefore void for want of a stamp.

Q. whether the indorser of a bill of exchange is an admissible witness to invalidate it.

The Plaintiff's counsel objected to the competency of *Carter*, contending that the indorser of a bill of exchange could not be a witness to destroy it.

Lord KENYON said he wished the point to be settled in the *House of Lords*. He was of opinion that the indorser was a witness proper to be heard, but other Judges were of a different opinion. There

was

was a case before Sir *Joseph Jekyll* many years ago; and another since, early in his attendance at *Westminster-hall*, wherein it was determined on a trial at bar (a) that three subscribing witnesses to an instrument might be permitted to deny the validity of it.

*Carter* was accordingly examined, and proved the fact of the bills having been drawn in *London*, and that the Defendants knew of their being so drawn.

It was then settled that the Plaintiff should tender a bill of exceptions, but the parties not having agreed on a bill, the cause came before the Court on *Tuesday* the 26th of *June*, in the following term, when a new trial was granted by consent. Lord *Kenyon* on that occasion said, that he adhered to the opinion he had given at the trial. But *per Buller J.* (b) This is a very different case from that of witnesses to a will. *Carter* had passed this *negotiable* instrument to the Plaintiff as a good and valid security, and it would be attended with consequences the most injurious to society, if these securities might be cut down by the persons passing them; it is only for two men to conspire together and cheat all the world. It is true that the witness gives an action against himself, but that may be a very different security from that which his evidence destroys (c).

(a) *Lowe v. Jolliffe*, 1 *Black.* 365. See also *Wright dem. Clymer v. Littler and Another*, 3 *Burr.* 1244.

(b) *Absente Ashhurst*, C. S.

(c) At one time it seems to have been considered as a general rule

rule that a man who had become a party to a written instrument should be estopped from giving any evidence to shew that it was void in its creation. (See *Walton v. Shelly*, 1 T. Rep. 296.) Afterwards the rule was confined to *negotiable* instruments, and an Underwriter who had subscribed a policy was permitted to give evidence to destroy its validity in an action against another underwriter, (*Bent v. Baker*, 3 T. Rep. 27.) At length a case similar to this of *Adams and Lingard* came before the Court, when it was determined by Lord *Kenyon*, *Grose*, and *Lawrence*, J. against the opinion of *Ashhurst*, J. that no objection could be made to the witness on the ground of estoppel; but that if not interested in the event of the cause he must be admitted. *Jordaine v. Lashbrooke*, 7 T. Rep. 601. See also *Rich v. Topping*, *post*, 224. On the same principle, where a person had been registered as the part owner of a vessel on the oath of *B.*, and had afterwards conveyed such share by deed to *B.*, covenanting for the goodness of his title, the Court of *K. B.* held, that he might call *B.* as a witness to prove that he had in fact no interest in the vessel, 1 *Stark*. 531, though the contrary had been previously ruled by Lord *Ellenborough* in *Nicksen v. Thomas*, 1 *Stark*. 85.

[ \* 119 ]

\* LEE v. AYRTON One, &amp;c.

Friday,  
May 25th.  
At West-  
minster.

THIS was an action against the Defendant for negligence as an attorney in suffering *Margaret Cogland*, who was in custody at the Plaintiff's suit, to be superseded for want of proceeding to judgment in due time. The declaration stated that

In an action against an attorney for suffering a debtor in custody at the suit of the Plaintiff to be superseded, proof that such debtor was a married woman destroys the action, when the declaration states that she was indebted. Q. Whether a declaration would be good without stating that the original Defendant was indebted?

M

*Margaret*

*Margaret Cogland* was justly and truly indebted to the Plaintiff in a large sum of money, to wit, &c. on promises, and that for the recovery of that debt the Plaintiff retained the Defendant, &c.

On the part of the Plaintiff *Margaret Cogland* was called as a witness, who on her cross-examination said, that at the time of contracting the debt she was a married woman, living separate from her husband, but without any allowance whatever from him.

*Erskine*, for the Defendant, contended that this evidence proved that the Plaintiff had no cause of action against the Defendant in the first action, and therefore that he had sustained no injury by her being discharged out of custody.

*Mingay*, for the Plaintiff, on the contrary insisted that the Defendant had been guilty of negligence in suffering the original Defendant to be discharged without having first obtained the consent of his client, and that he had no right to determine at his own chambers whether the Plaintiff had a good cause of action or not.

Lord KENYON. Were the declaration formed to meet the question, it might perhaps bear some argument, but this declaration sets out with stating, [ \* 120 ] that \* the original Defendant was indebted to the Plaintiff. By the evidence it appears that this averment is not true, so that clearly this action cannot be maintained.

The Plaintiff was therefore called (*a*).

(*a*) *Vide Alexander v. Macauley and Another*, 4 T. Rep. 611. *Aitchison and Another, v. Madock and Another*, post.

HANSON

## HANSON v. ROBERDEAU.

Wednesday,  
May 30th.  
At Guildhall.

THE Plaintiff had bought a *post obit* bond at an auction, where the Defendant acted as auctioneer, and the bond not being assigned within the time agreed upon by the conditions of sale, the Plaintiff brought the present action of *assumpsit* against the auctioneer.

The name of the principal was not mentioned at the time of the sale, and one of the conditions was, that £25 *per cent.* should be paid as a deposit; but although the Plaintiff was to give £645 for the bond, only £50 was paid down, which it was proved the Defendant agreed to accept as a deposit.

Two objections were taken by the Defendant's counsel. 1st. That the agreement was not complied with on the part of the Plaintiff, the whole deposit money not being paid. 2dly. That the principal, and not the auctioneer, was liable to an action.

Lord KENYON. The Defendant, after having agreed to take £50 for the deposit, cannot object that too little was paid. And though where an auctioneer names his principal, it is not proper that he \* should be liable to an action (a), yet it is

Where an auctioneer does not disclose the name of his principal at the time of the sale, he is personally liable to an action for damages for not completing the contract. If the conditions of sale are that a certain sum *per cent.* shall be paid as a deposit, and the auctioneer accepts a less sum, he cannot afterwards object that too little was paid.

a very

(a) This must be understood to relate only to an action for damages, for the auctioneer is bound to keep the deposit until the title is made out, and he is personally liable to return it in



a very different case when the auctioneer sells the commodity without saying on whose behalf he sells it; in such a case the purchaser is intitled to look to him personally for the completion of the contract.

The Jury found for the Plaintiff, damages £200, which was proved to be the value of the bond over and above the £645, agreed to be given for it.

case a good title cannot be made. *Burrough, Widow, v. Skinner*, 5 Burr. 2630. *Vide Morgan v. Carder*. *Paley's Principal and Agent*, 250. *Edwards v. Hodding*, 5 Taunt. 815.

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CRANCH, Executrix, &c. v. KIRKMAN, and Others.

Where there is a mutual unsettled account and reciprocal demands, the statute of limitations does not attach. The exception in that statute as to *merchants' accounts*, is not confined merely to persons of that description.

THIS was an action for goods sold and delivered by the testator, to which the Defendants pleaded the general issue, and gave notice of set-off for goods sold and delivered, &c.

The Defendants' set-off consisted of several *items* for goods, sold at different times from 1783 to 1788. The Plaintiff's demand accrued chiefly in the year 1783, but there were two small articles sold in the year 1789.

It was contended on the part of the Plaintiff that the greatest part of the set-off was within the statute

statute of limitations, no promise being proved within six years.

\* Lord KENYON said he thought this was within [ • 122 ] the exception in the statute as to merchants' accounts. He agreed that where the demand of one party arises long after the demand of the other, that shall not revive the antecedent account, but this was in the nature of a running and *mutual* account between the parties, and was precisely the case put by Mr. J. *Denison*, in *Cotes v. Harris*, which his Lordship said he particularly remembered, and of which he believed no one but himself had taken a note, the report of it which appeared in print (a) having been furnished by him.

Mr. *Bearcroft*, for the Plaintiff, contended that this exception extended to no other description of persons but *merchants*, in which he was over-ruled by Lord *Kenyon*.

The Plaintiff proving a demand beyond the amount of the set-off, had a verdict for the balance.

(a) *Bull. Ni. Prius*, 149, 50. *Catling v. Shoulding*, 6 T. Rep. 289. 2 *Saund.* 127. *Topham v. Braddick*, 1 Taunt. 572.

Thursday,  
May 31st.  
At West-  
minster.

# TURNER v. PHILIPPS, Esq.

No action  
lies to re-  
cover back a  
fee given to  
a barrister to  
argue a  
cause which  
he did not  
attend.

*ASSUMPSIT* for money had and received.

The Plaintiff being a party in a former cause, had given the Defendant a brief to attend as one of his counsel on the trial of that cause; and the Defendant not having attended the trial, the present action was brought to recover back the fee given to him on that occasion.

[ \* 123 ]

Lord KENYON advised an agreement between the parties, saying, that whether Mr. *Philipps* would chuse \* to return the fee or not, was for his own consideration; but if the cause was to proceed he should feel himself obliged to interpose, and the parties might apply to the court, if they were dissatisfied with his opinion. His Lordship alluded to the case of *Chorley* and *Balcot (a)*, lately decided, and mentioned the general opinion of the Profession, that the fees of Barristers and Physicians were as a present by the client, and not a payment or hire for their labour.

Upon this the parties agreed to settle the cause out of Court, but *Garrow*, who held a brief for Mr. *Philipps*, said that he had not been guilty of the negligence imputed to him, for that it never was intended that he should attend the cause, but the fee was given him as a compliment for the trouble he had taken in the former stage of it.

(a) 4 T. Rep. 317. Vide *Fell v. Brown*, ante, 96, the cases cited in the note on that case, and 3 Bl. Com. 28, 9.

DUNLOP

## DUNLOP v. WAUGH.

Friday, June  
1st. At  
Westminster.

*ASSUMPSIT* on a promise that a horse bought by the Plaintiff of the Defendant was only eight years old, when in fact he was fourteen.

The Defendant when he sold the horse shewed the Plaintiff a written pedigree, which he had received with him from the person of whom he had bought him, and said that he sold the horse according to that \* pedigree, knowing nothing of him further than he learnt therefrom, the mark being out of his mouth when he had bought him. The pedigree was clearly proved to be false, but the Defendant had no knowledge of this when he sold the horse.

Lord KENYON was clearly of opinion that this was no warranty. The Defendant related all he knew of the horse, and did not enter into any express undertaking that the horse was of the age stated in the pedigree, but stated the contents of that, which the Plaintiff relied on.

If a man, not knowing the age of a horse, but having a written pedigree which he received with him, sell him as a horse of the age stated in the pedigree, at the same time stating he knows nothing of him but what he has learnt from the pedigree, he is not liable to an action when it appears that the pedigree is false.

[ \* 124 ]

The Plaintiff was nonsuited (a).

(a) In *Jewdwine v. Slade*, K. B. Sittings after Tr. Term, 37 G. 3. M. S. 1 *Esp. Cas.* 572. S. C. an action was brought on the warranty of two pictures bought by the Plaintiff, which the Defendant had represented as the works of *Claude Lorraine* and *Tenniers*; Lord *Kenyon* held that the action was not maintainable unless the Defendant knew that the pictures were not the works of those masters, for by a representation of a fact like this, of which the Defendant could have no certain knowledge, he must be understood as speaking to his belief only.

CASS.

## CASS and Another v. CAMERON.

A man who has been arrested is a good witness in an action against the sheriff for his escape.

THIS was an action on the case against the sheriff for permitting one *Whittaker*, against whom the Plaintiff had sued out a *latitat*, to escape, and returning *non est inventus*.

A doubt was at first entertained whether *Whittaker* could be a witness for the Plaintiff in this cause. But afterwards Lord *Kenyon* said, that he saw no objection to his competency, for the debt would not be discharged by a verdict and judgment in this cause, but the witness would still remain liable to an action at the suit of the Plaintiff.

He was therefore examined, but not making out the case, the Plaintiff was nonsuited (a).

(a) *Vide Rex v. Warden of the Fleet, Bul. N. P. 67.*

[ \* 125 ]

Wednesday,  
June 6th.  
At Guildhall.

## \* MEAD v. DAUBIGNY.

In an action for words spoken to A. concerning the Plaintiff, evidence of words (not themselves actionable) spoken to B. may be received to shew the malice of the Defendant.

CASE for scandalous words. All the counts in the declaration stated the words to have been spoken in a *colloquium* with a lady of the name of

of *Barnston*, to whom the Plaintiff was about to be married, by reason whereof he lost his marriage, &c.

After proving the words by Miss *Barnston*, the Plaintiff called another witness to prove that the Defendant had, in a conversation with this witness, used other words.

*Garrow*, for the Defendant, objected to this evidence. He said it was not admissible in this action, for all the counts stating the slander to have been published to a particular person, it would be manifest injustice to suffer the Plaintiff to give evidence of other conversations; for the Defendant comes here to defend himself against words spoken to that person only, and had he been aware that other words were to be given in evidence, he might have come prepared to deny or justify them.

*Erskine*, for the Plaintiff, answered the objection by saying, that no words could be given in evidence which were themselves actionable, and that the reason of that distinction was, not because the Defendant might not be able to answer them as he otherwise would have done, but because the Plaintiff might not have damages for those words, and then bring another action, making those very words the foundation of it. That the only intent in proving such words was to shew the *animus* and malice of the Defendant.

\* Lord KENYON. In actions for words, I have [ \* 126 ]  
always

always understood that the Plaintiff may give evidence of *any* words used by the Defendant, to shew the spirit and temper by which he was actuated. I must own I do not remember any case exactly like the present, where all the counts stated conversations with one particular person, and evidence is offered of words spoken to another person ; but I think that I may receive it in this case, for the only use of it is to shew the state of the Defendant's mind and malice towards the Plaintiff. I must however request that no evidence may be offered of words, actionable in themselves, for I am clearly of opinion that such evidence is not admissible (a).

The

(a) *Cooke v. Field*, 3 *Esp.* 133. accord. *Sed Vide* *Charlton and Barret*, ante, 22. and *Lee v. Huson*, post, 166, in both which cases Lord *Kenyon* permitted other words and libels, actionable in themselves, to be given in evidence to shew the malice of the Defendants. And in *Scott v. Lord and Lady Oxford*, *Hereford Sum. Ass.* 1808, *Lawrence*, J. in like manner, permitted words, not laid in the declaration, and which were actionable, to be given in evidence in aggravation of the damages. So in *Rustell v. M<sup>c</sup>Quister*, 1 *Camp.* 48. n. Lord *Ellenborough* permitted actionable words to be given in evidence after the words laid in the declaration had been proved, to shew *quo animo* the latter were spoken, and said the distinction between words actionable and not actionable was not founded in any principle. And in *Tate v. Humphreys*, 2 *Camp.* 73. n. which was an action for words imputing perjury, *Graham*, B. held, that an indictment subsequently preferred by the Defendants against the Plaintiffs was evidence to shew *quo animo* the words were spoken, and the Court above were of opinion that the evidence had been properly received. But in an action for a libel, *Mansfield*, C. J. held,

The Defendant called no witnesses, and the Plaintiff had a verdict and £500 damages.

held, that other libels published by the Defendants could not be received to shew the malicious motive, unless they expressly referred to the libel declared on, *Finnerty v. Tipper*, 2 Camp. 72.



# C A S E S I N K. B.

AT THE SITTINGS

AT NISI PRIUS,

AFTER TRINITY TERM, 32 GEORGE III. 1792.

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Thursday,  
June 28th.  
At Westminster.

ROBSON v. HALL.

On a wager that *A.* will trot 2 horses 16 miles in two successive hours, he may trot them in any manner he thinks proper.

THIS was an action of *assumpsit* on an agreement, whereby the Defendant “betted the Plaintiff “£150 to £100, that he did not find two geldings “to trot 32 miles in two successive hours, carrying “the said Mr. *Robson* and no one else.” It was afterwards, by an indorsement on the agreement, agreed “that the bet should be doubled (*a*).”

The declaration contained 1st, A count on a bet of £300 to £200. 2dly, On the first bet of £150 to £100; and, lastly, a count on another bet of £150 to £100. There was but one stamp on the agreement, and the common breach for non-payment of the money was assigned on all the counts.

(*a*) This wager appears to have been illegal, *Blaxton v. Pye*, 2 *Wils.* 309. *Clayton v. Jennings*, 2 *Blac.* 706. *Ximenes v. Jaques*, 6 *T. R.* 499. *Whaley v. Pajot*, 2 *Bos. and Pul.* 51. •

The

The Plaintiff performed the trotting within two successive hours, but in the following manner, *viz.* he trotted one horse 12 miles, then trotted the other \* 4 miles, turned back to the place where he left the first horse, and compleated the match by again mounting that horse, and trotting him 12 miles more. [\* 128 ]

*Mingay*, for the Defendant, objected that the Plaintiff had not performed the contract. That it ought to have been performed by trotting each horse 16 miles, without stopping, which was the evident intention of the parties.

Lord KENYON over-ruled this objection, being of opinion, that the true construction of the agreement was that the Plaintiff might trot the two horses the distance, and in the time agreed upon, in any manner he thought proper.

*Mingay* then objected, that there should have been a 6s. stamp on each agreement, for that they were distinct and separate transactions.

then by another agreement, indorsed on the first, consent that the bet should be doubled, there must be two 6s. agreement stamps.

Lord KENYON was of this opinion, but said that as there was a count on each agreement, the Plaintiff

(a) So where several persons have been admitted to the freedom of a corporation upon one stamp, the admission of the person *first* named was held to be good, and that of all the others void, *per Ashurst J. in Gelby v. Lockyer, Doug. 207. Sed vide Rex v. Reeks, 2 Stra. 716.* So a release to the captain and others of the crew, having only one stamp, was held to be at least a good release to the captain, his name standing first, and it being first tendered to him, *Perry v. Barchier, 4 Camp. 80. See also Doe dem. Copley, Bart.*

If two persons by an agreement in writing, lay a wager, and that the bet is only one stamp, the winner may recover the first bet on a count thereon (a).

Plaintiff might recover one sum of £150 on the agreement which was stamped.

When

*Bart. v. Day*, 13 *East*, 244. and *Powell v. Edmunds*, 12 *East*, 6. And where several enter into an agreement to subscribe for a certain purpose, it is but one agreement for the purpose of the stamp duty, though several as to each, *Davies v. Williams*, 19 *East*, 232. If a paper contained originally two distinct agreements, one of which is erased, one stamp is *prima facie* sufficient; and it lies upon the opposite party to shew that both agreements were on the paper at the time this stamp was affixed. *Waddington v. Francis*, 5 *Esp.* 182. *Ellenborough*, C. J. In these cases there was no alteration of the original agreement, which remained as if no subsequent agreement had been made. And where an alteration was made for the mere purpose of correcting a mistake, as adding the words, "or order," in a bill of exchange, which had been accidentally omitted, (*Kershaw v. Cox*, 3 *Esp.* 246. cited 10 *East*, 435. and 15 *East*, 417.) or turning a promissory note into a bill as originally agreed upon, *Webbe v. Maddocks*, 3 *Camp.* 1. or altering the name of the port from whence the certificate of a ship's registry was granted when a wrong port had been inserted by mistake, *Cole v. Purkin*, 12 *East*, 471. or rectifying the name where a mistake was made in declaring the interest on a policy, *Robinson v. Tournay*, 1 *Maule and S.* 217. in all these cases it was holden that no fresh stamp was necessary. So, in *Henfree v. Bromley*, 6 *East*, 309. where an umpire having made his award, altered the sum after the expiration of the time for publishing it; the Court held that the alteration being a mere nullity, the award, as at first made, might be enforced. But in *French v. Patton*, 9 *East*, 351. the Defendant having subscribed a policy of assurance, which in the printed part was on *ship and goods*, but by a written note in the margin was restrained to *ship and out-fit*; and a memorandum was afterwards inserted in the policy, as follows, viz. "It is hereby agreed that the interest in this policy of insurance shall be on ship and goods instead of ship and out-fit, as originally declared." The Court held that the original risk being so altered, the policy ceased to be a valid instrument, and

When the cause had proceeded so far, it appeared that the money betted had been deposited in a Banker's hands at the time the wager was laid, and a receipt had been given to the Plaintiff and Defendant in their joint names.

On an objection being made that the action should have been brought against the stake-holder,

\* Lord KENYON said, It should have been laid in the declaration and proved in evidence, that the money having been paid into the hands of the Banker, the Defendant refused to suffer the Plaintiff to receive it from him. The money was paid in on their joint account, and one cannot get it from the Banker without the consent of the other. If the Plaintiff was to recover this money from the Defendant, he might never be able to get it out of the Banker's hands (a).

The Plaintiff was nonsuited.

and that no action could be maintained upon it, either in its original or altered form, until a new stamp was impressed upon it. The like decision took place in *Bowman v. Nichol*, 5. T. Rep. 537. where a bill having been drawn on a proper stamp at twenty-one days, was, while in the hands of the drawer, altered to fifty-one days by consent of all parties; and by the like consent was, after the time for payment was out, altered again to twenty-one days; the Court held, that the time of payment being spent when the second alteration was made, it was a new interest and required a new stamp. So in *Knill v. Williams*, 10 East, 431. a promissory note being made payable as for "value received" generally, was, after it had been delivered, altered, by adding the words, "for the good will of a house in trade;" this also was held to be such an alteration as to require a fresh stamp.

(a) *Kerr v. Osborne*, 9 East, 376. accord. There the Court determined

Where money betted is paid into the hands of a Banker, who gives a receipt to the persons betting as received of them; the winner cannot recover on the common count on a wager, but must state that the money was so paid, and that the Defendant refused to permit him to receive it.

[ \* 129 ]

determined that the money in litigation having been by mutual consent paid over to a trustee, in trust for the party entitled, it could only be sued for and recovered from the stake-holder by the party entitled to it; and not from the party who was originally indebted, although he agreed to waive all objections of form.

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*Friday,  
June 29<sup>th</sup>.  
At Guildhall.*

SPENCER v. GOULDING and Another.

A book-keeper to a carrier is a good witness for him without a release.

THIS was an action against the Defendants as common carriers, for not safely carrying and conveying a parcel from *Worcester* to *London*.

The question in the cause was, whether the parcel was delivered according to the direction or not. The Plaintiff's witness swore that it was directed to "*Richard Spencer*, to be left at the "*White Bear, Piccadilly*, till called for." The Defendants called witnesses to prove that it was directed to "*Elizabeth Spencer*, to be left at the "*Black Bear, Piccadilly*," and it was accordingly left there.

The first witness they called was their book-keeper at *Worcester*, who was objected to as an interested witness; and no release was produced.

Lord KENYON thought him a good witness, *of necessity*, without any release; and he was sworn and examined.

[ \* 130 ]

\* The cause being clearly with the Defendants, they, at the recommendation of Lord *Kenyon*, and  
in

in compassion to the poverty of the Plaintiff, agreed to withdraw a juror (*a*).

(*a*) *Vide Bul. N. Pr.* 289. *Peake's L. Ev.* 159. So a carrier employed by *A.* to carry a sum of money to *B.* and the like sum to *C.* is a good witness in an action by *A.* against *C.* to prove that by mistake he delivered both sums to *C.* *Barker v. Macrae*, 3 *Camp.* 144.

MARCH *v.* WARD.

*Saturday,*  
*June 30th.*  
*At West-*  
*minster.*

*ASSUMPSIT* on a promissory note made by the Defendant and one *Bowling*, in the following words; *viz.* "I promise to pay three months after date, to *Wm. March*, £8. 5*s.* for value received in fixtures.

"*Robert Bowling.*

"*Thomas Ward.*"

It was objected that this promissory note was joint only, and not several.

LORD KENYON. I think that this note, beginning in the singular number, is several as well as joint, and that the present action may be maintained on it. I remember a case tried before Mr. *Moreton* at *Chester*, exactly similar to the present, wherein I was counsel for the Defendant; I persuaded the Judge that it was a *joint* note only, and the Plaintiff was nonsuited (*a*), but on an

A promissory note signed by two persons, and beginning "*I promise, &c.*" is joint and several. See *Mansel v. Burrel*, 7 *T. Rep.* 352. as to joint and several promises.

(*a*) *Note.* This is now held to be only matter of abatement. *Cowp.* 832. and so it was determined in the case of a bond so long since as *Whelpdale's case*, 5 *Co.* 119.

N

application

application being afterwards made to this Court, they were of a contrary opinion, and a new trial was granted. The letter *I* applies to each *severally*.

Verdict for the Plaintiff.

[ \* 131 ]

\* HARTLEY v. PEHALL.

Quere. Whether a covenant by the lessee of a public house that he and his assigns will buy all their beer of the Plaintiffs is binding on the assignee. A man is not obliged to accept a conveyance when the title is doubtful.

THIS was an action of *assumpsit* on an agreement to take a public house.

At the time the parties were treating about the house, the Defendant's appraiser was proceeding to examine the lease, when the Plaintiff stopped him, and said he need not trouble himself as the lease contained nothing but the usual and ordinary covenants, and *the house was a free house*. In consequence of this, the appraiser desisted from further examining the lease, and the Defendant entered into the agreement on which the action was brought.

• The Plaintiff was not the original lessee, but the persons who had assigned the lease to him were brewers, and had procured a covenant to be inserted in the assignment, that the Plaintiff, his executors, administrators and *assigns*, should deal with them, and purchase at their brewery all the beer consumed in the house. No such covenant was inserted in the original lease.

Lord

Lord KENYON said, he would not now determine, nor was it necessary to do so, whether this was a binding covenant on the assignee (*a*). He thought it a question of some nicety, but whether it was or not, he thought it equally a defence to this action. When a man buys any commodity he expects to have a clear indisputable title, and not such a one as may be questionable, at least, in a court of law. No man is obliged to buy a lawsuit.

• Verdict for Defendant (*b*).

(*a*) A covenant that the lessee, his executors and administrators, shall constantly reside on the demised premises binds the assignee though not named, *Tatem v. Chaplin*, 2 H. Blac. 133. but a covenant that the lessee, his executors and assigns, will not permit persons to work in the mill who are settled in other parishes without a certificate, does not bind the assignee, *Mayor of Congleton v. Pattison*, 10 East, 130.

(*b*) So where in the conditions of sale of the lease of a public house it was described as "a free public house," and the lease contained a covenant that the lessee and his assigns should take their beer from a particular brewer, Lord *Ellenborough* held, that the purchaser was entitled to recover back his deposit, *Jones v. Edney*, 3 Camp. 285. And the covenant in the lease being read in the hearing of the purchaser, was held not to vary the case, as the auctioneer at the same time declared that the covenant had been decided to be bad. Such a covenant cannot be enforced unless the brewer supply the publican with good beer, *Holcombe v. Hewson*, 2 Camp. 391. *Cooper v. Twibill*, 3 Camp. 286. *Ellenborough*, C. J.



[ \* 132 ]

*Monday,  
July 2d.*

## \* REX v. HUBE and Others.

*Parol evidence of the oaths required by the Toleration Act having been taken, is not admissible. It is not necessary to prove the taking of those oaths in an indictment for disturbing the congregation.*

THIS was an indictment on the Toleration Act, 1 W. & M. c. 18. for *maliciously and contemptuously* disquieting and disturbing Protestant dissenters in the exercise of their religious worship.

The prayers were read in German, and the congregation was composed of Lutherans, some of them natives of *Germany*, and the rest *Englishmen* descended from *German* parents.

The prosecutor (who was preacher at this meeting-house) proved that it was duly registered; and he swore, that when the congregation was singing the hymns, the Defendants forcibly entered the chapel, pulled the clerk out of the desk, &c. The record of the oaths was produced, and all the formalities required by the statute appeared to have been observed, except the declaration, which did not appear on the record. The prosecutor swore that he had taken all the oaths.

LORD KENYON said, it was matter of record, and therefore could not be proved by parol evidence (*a*), but that he did not think it necessary to prove the taking of any of the oaths. The preacher was liable to a penalty for not doing so, but it did not disqualify him from acting.

(*a*) *Salk.* 284.

The prosecutor's case being closed, *Piggot*, for the Defendants, stated their case, which he said was as follows, *viz.* That two of the Defendants were elders of the chapel, and that the third had, till the day on which the fact complained of was committed, been, \* and acted as clerk thereof. That on that day, the preacher having appointed another clerk, he, with several other persons, entered the chapel through the preacher's house before the public door was opened, and the new appointed clerk seated himself in the desk, the others also seating themselves in different pews. That then they began the ceremony, and when they had proceeded through some part of it, they opened the public doors, on which the Defendants entered, and requested the clerk to leave the desk, and the others to leave their pews; which they refusing, the Defendants pulled them out by force.

*German Lutherans are within the protection of the Toleration Act.*

*It is no defence to an indictment on that act, that the Defendant entered the chapel for the purpose of asserting his right to the clerk's reading desk.*

[ \* 133 ]

He contended that the Defendants were entitled to an acquittal on two grounds. First, That this was not a meeting-house within the act of parliament. Secondly, That the facts of this case did not constitute that offence, which it was the object of the statute to prevent.

As to the first. Before the Act of Toleration there were many acts of Parliament, all which meant to destroy conventicles contrary to the established church. These were all virtually repealed by the 1st of *W. & M.* which act could only have in view the persons liable to punishment under the previous acts of parliament. By the 22 C. 2.

C. 2. c. 1. it was enacted, "that if any person of  
 "the age of 16 or upwards, *being a subject of this*  
 " *Realm*, shall be present at any assembly, con-  
 " venticle or meeting, under colour or pretence of  
 " any exercise of religion, &c." it shall be lawful  
 for any justice of the peace to make a record of  
 the offence, and to impose the penalty therein  
 mentioned. These persons were not *subjects of*  
 [ \* 134 ] *this \* realm*; and therefore are not within the act  
 of parliament.

As to the second objection. This is a place of  
 worship for *Foreigners* in a foreign language. The  
 Defendants claim a right in it, which they com-  
 plain has been invaded, and they come to pro-  
 secute their claim. They do not therefore come  
 in the language of the act, *maliciously or con-*  
*temptuously*. The persons whom the statute meant  
 to punish, were those, who violently oppose a form  
 of worship not suitable to their own ideas.

Lord KENYON, as to the first objection gene-  
 rally, said, he would save the point for the opinion  
 of the Court if the Defendants wished he should  
 do so, but that he had no doubt in his own mind,  
 and was clearly of opinion that this was a meeting-  
 house within the act of parliament. The facts  
 stated by way of defence could be no answer to  
 this prosecution. Whether the prosecutor and his  
 party were right or wrong could not be considered  
 on this trial. The conduct of the Defendants was  
 highly indecorous and improper. If they had a  
 legal right they might obtain redress in a Court of  
 justice. Instances might be put where it would  
 be

be considered extremely indecent for a man to exert such a right. In the Church of *England* a parson might be instituted and inducted to a living, but for want of a proper presentation he might not have a legal title. Should it be said that another clergyman having a better title, might enter into a place which mankind hold sacred and *manu forti* pull him from the pulpit? No, If he has the right his patron may bring a *quare impedit* or *quare incumbavit*, \* whichever is suitable to his case. So here the Defendants might have applied to this Court for a *mandamus*, or to the Court of Chancery as the case might require. [ \* 135 ]

The Defendants' counsel also objected that by the 18th *sec.* of the act the indictment should have been *tried* at the sessions. In the present case the indictment had been there found, but removed by the prosecutor: it was agreed that this point should also be saved for the opinion of the Court; subject to which the Defendants were convicted.

Note. On this last question, the Court in *Hilary* Term, 34 *Geo.* 3. gave judgment for the prosecutor. See 5 *Term Rep.* 542.

## FISH v. SCOTT.

If *A.* strike *B.* and *B.* return the blow, on which *A.* indicts *B.* for an assault, the bare fact of *A.* having struck the first blow is not sufficient to support an action for a malicious prosecution.

THE Defendant had indicted the Plaintiff for an assault, on which indictment the Plaintiff had been found not guilty, and this action was brought for a malicious prosecution of the indictment.

*Erskine*, for the Plaintiff, stated that the Defendant first assaulted the Plaintiff, and the Plaintiff having returned the blow, the parties by agreement went to an adjoining field, where they settled their quarrel by a regular boxing match. Notwithstanding this the Defendant indicted the Plaintiff.

[ \* 136 ]

Upon which opening Lord *Kenyon* stopped the cause, saying it was not enough to support this action, that the party indicted was justified in returning the blow that he had received, or that the other had \* been guilty of the first assault. There must be something more. Though the Plaintiff was justified in defending himself from the Defendant's assault, it was still an assault, and there was probable cause for the prosecution. Besides, both parties here joined in a deliberate breach of the peace by retiring into the field and fighting.

The Plaintiff was nonsuited without examining a witness.

LAWRANCE

## LAWRANCE and Others v. DIXON.

Saturday,  
July 7th.

THIS issue was directed by the Court of Chancery, to try whether the Plaintiffs were nephews and nieces of *Elizabeth Hall*, deceased.

The *Fleet* books are admissible evidence on a question of pedigree.

The only disputed fact in the cause was the family of *Elizabeth Hall*. On the part of the Plaintiffs, it was contended that her maiden name was *Lawrance*, and that she was sister to the father of the Plaintiffs. The Defendants on the other hand contended that she was descended from a family of the name of *Wright*.

Amongst other evidence the Plaintiffs produced (by a witness who said he had purchased them) the *Fleet* books, wherein the marriage of *Daniel Hall* and *Elizabeth Lawrance* was entered to have been celebrated on the 7th of *May*, 1737.

Lord KENYON said, he received this evidence with great doubt. There was a tradition in *Westminster-hall*, that when the books of the *Fleet* were produced \* before Lord *Hardwicke*, he would not receive them in evidence, but cut them to pieces in court. After so great an authority had declared against them, his Lordship said, he could not receive them without some hesitation, but that he was inclined to think that, in a *pedigree cause*, they were admissible, though by no means such evidence as ought to be favourably received (a).

[ \* 137 ]

(a) *Vide Reed v. Passer and Others, post*, 231. See also *Peake's Law Evi.* [87.] 89.

After

After much evidence had been given, it plainly appeared that *Elizabeth Hall* was sister to the Plaintiff's father, that in the early part of her life she went to live with a gentleman of the name of *Wright*, assumed his name, and passed in the world and amongst his relations as his niece; in consequence of which, she after his death received a distributive share of his personal estate. At her death she disposed of her fortune by will, giving £1000 to the Plaintiffs, and after giving other legacies, appointed the Defendant her executor. The Plaintiffs had filed a bill in the Court of Chancery for the surplus of the personal estate, as being her next of kin, and in consequence of the doubts occasioned by her having passed as the niece of *Wright*, the present issue was directed.

The Jury found for the Plaintiff.

When the cause was over, Lord *Kenyon* said, he was extremely clear that the Court of Chancery would order the Defendant (who was the next of kin to *Wright* the intestate) to retain to the full amount of the money which he had been defrauded of by this imposture of the testatrix (a).

(a) *Vide* the Doctrine of Election, 1 *Brown, C. Cases*, 587.

## \* REX v. PEPYS, Esq.

[ \* 138 ]

Tuesday,  
July 10th.

THIS was an indictment for perjury, said to have been committed in answer to an amended bill in the Court of Chancery. The bill was filed by one *Knight* and *Elizabeth* his wife against the Defendant and his wife, for the purpose of redeeming some mortgaged premises, the equity of redemption whereof had been assigned by *John Hill* to *Francis Hopping*, late husband to the Plaintiff *Elizabeth Knight*, and by him devised to her.

The bill stated the mortgage of the premises in question to one *Thomas Triquet* for £600, and a subsequent mortgage of other premises for £500 and £200, for all which sums *Hill* gave his bond, that *Hill* assigned to *Hopping* as above-mentioned, and that *Triquet* by his will bequeathed the mortgaged premises to the Defendant, and his wife, who was *Triquet's* daughter (*b*).

It is no objection to the competency of a witness on an indictment for perjury committed in an answer in Chancery, that in his answer to a cross bill filed by the Defendant he has sworn the fact which he is to prove on the indictment.

If in answer to a bill filed by *A.* for redemption of lands assigned to him by *B.* the Defendant swear that he had no notice of the assignment, and therefore insists on tacking another bond debt due from *B.* to his mortgage (*a*), this is a material fact on which perjury may be assigned.

The

(*a*) *Vide Ambler*, 733.

(*b*) I have been informed by the gentlemen who acted as solicitors for the Defendants, Messrs. *Dobie* and *Thomas*, that there is a little inaccuracy in the statement of the facts of this case, which I take this opportunity of correcting. The statement communicated by them to me is as follows:—*Hill*, in Aug. 1777, made a mortgage by two several deeds of equal date of certain leasehold houses in *London*, to *Triquet*, for securing the respective sums of 500*l.* and 200*l.* and at the same time executed two several bonds, by way of further security. In Nov. 1777, *Hill*, by two other deeds of equal date, mortgaged to

*Triquet*



The answer stated that the assignment from *Hill* to *Hopping* was made without the privity or consent of the Defendant, and that he knew nothing of that transaction. Upon this answer the bill was dismissed, and on it the present prosecution was founded.

The Defendant had also filed a bill against *Knight* and his wife to foreclose the equity of redemption, in the answer to which the wife had sworn that the Defendant did consent to, and was acquainted with the assignment of the equity of redemption to *Hopping*.

*Elizabeth Knight* was called as a witness for the prosecution.

[ \* 139 ]      \* *Erskine* objected to her on account of interest. If it was a material fact in the Court of *Chancery* whether the Defendant was privy to the assignment or not, she ought not to be permitted to give

*Triquet* several leasehold houses in *Surrey*, for the respective sums of 360*l.* and 240*l.* making together 600*l.* and gave another bond to *Triquet* for the same. *Hill* in the same year assigned to *Francis Hopping* the equity of redemption, of *all* the mortgaged premises, and *Hopping* covenanted with *Hill* to pay off the whole of the principal money and interest. After *Hopping's* death his widow, the prosecutrix, assigned the insufficient estate to *Dunning* who was insolvent. The Plaintiffs filed their bill for a redemption of the premises in *Surrey*. The Defendants by their answer insisted that the houses in *London* were an insufficient security, and that the Plaintiffs must redeem both estates or neither; and that the *London* estate was assigned to *Dunning* without his knowledge. Upon this the Plaintiffs amended their bill, charging the Defendant with notice of the assignment to *Dunning*, and upon the denial of this notice it was that the perjury was assigned.

evidence

evidence in this cause, for she having sworn directly contrary in her answer, will be intitled to dismiss the Defendant's cross bill if she succeeds in this cause, and convicts him of the perjury imputed to him; so that in this respect she has a direct interest in the event of the cause. But he contended that this fact on which the perjury was assigned was not a material fact, and said he was informed the *Chancellor* had so decided when he dismissed the prosecutor's bill, for whether the Defendant consented to the assignment or not, he had still a right to retain the premises till *all* the money due on the bond, as well that for which *these premises* were mortgaged, as that for which the other mortgage was made, was paid. The Defendant could not be deprived of this right unless he formally renounced it by deed.

LORD KENYON. I think there can be no objection to this woman's testimony: her own answer will be no evidence for her in the Court of *Chancery*, other evidence must be adduced before she can prove her case there, so that she has no immediate interest. The fact on which the perjury is assigned is a material fact; mere knowledge has often been held sufficient to bind in equity, and the consent need not be by deed. There is one case (a) in the books which was thought \*peculiarly

(a) See 1 *Vez.* 96. also *Mocatta & al' v. Murgatroyd*, 1 *P. W.* 393. But in the case of *Becket v. Cordley*, (*Bro. Cha. Rep.*) 353. Lord *Thurlow* thought the case of *Mocatta* and *Murgatroyd* went too far in imputing notice to the first mortgagee upon the mere circumstance of his being a witness to the second mortgage,  
since

liarily hard at the time, where a son was held to be affected with notice, by only attesting the execution of some deeds by his father. Whichever way it is taken, I think this woman is a good witness.

She was examined, but the Defendant was acquitted without calling a witness, the prosecution appearing in a very odious light to both Court and Jury.

since it is in common practice for persons to attest the execution of deeds without being made acquainted with their contents, and see *Reed v. Williams*, 5 *Taunt.* 256. acc.

LAROCHE, Bart. and Others, *v.* WAKEMAN,  
Esq. and Another.

If an uncertificated bankrupt carry on trade and sell a vessel to *A.* he has a good title against all persons but the assignees.

**T**ROVER for a vessel or trow, called the *Experiment*, and her tackle, &c. which the Defendant *Wakeman* as Sheriff, and the other Defendant as Plaintiff, in an action against one *Smith*, had seized under a *fieri facias* in that action.

Before the seizure *Smith* had, by a bill of sale, assigned the vessel in question to the Plaintiffs in trust for one *Walker*, who had paid a valuable consideration for it. At the time of this assignment *Smith* was an uncertificated bankrupt, but had the possession of the vessel, and carried on trade on his

his own account, and without any molestation by his assignees.

\* *Mingay*, for the Defendant, objected that this vessel was the property of the assignees, and therefore that *Smith* could give the Plaintiffs no title. [\* 141]

Lord KENYON. If the assignees of *Smith* take any steps to disaffirm his title, they may do so(a), but if they do not, he being the ostensible owner may convey a title to the Plaintiffs, subject to be disaffirmed by them, but it is not competent to third persons to make this objection. I think I remember a case of this kind.

It appeared that the vessel was at the time of the sale lying in the *Thames* at *Abingdon*, that she

The bill of sale of vessels for inland navigation need not be registered.

(a) *Evans & al<sup>o</sup> v. Mann*, Cowp. 570. *Vide Chippendale v. Tomlinson*, 1 Co. Bank. Law, 518. In *Ashley v. Kell*, 2 Stra. 1207. the Court held "that though under 5 Geo. 2. c. 30. the "future effects of a bankrupt against whom two commissions "had issued, were liable to be seized for the benefit of his creditors, yet the bankrupt had in the mean time such a property "in them as enabled him to transact business, and sell to a bona fide purchaser." See also *Webb v. Fox*, 7 T. Rep. 391. *Fowler v. Down*, 1 Bos. and Pul. 44. where the Court held that the bankrupt himself might maintain trover, and confirmed this case of *Laroche v. Wakeman*.—But in *Kitchen v. Bartsch*, 7 East, 53. it was determined, that to an action of *assumpsit*, at the suit of the bankrupt on a promissory note for money lent by him, the Defendant might plead that he had not obtained his certificate, and that the assignees required the Defendant to pay the money to them; and that a Replication, saying the cause of action accrued after the bankruptcy, and that the Defendant treated with the bankrupt as a person capable of receiving credit, was no answer to the plea, and *vide Cumming v. Roebuck*, 1 Holt, 172. and note there.

was

was decked, and went from *London* to *Droitwich*, &c. but it did not appear that she had ever been at sea, though she was frequently in the *Severn* where salt water came.

Upon this, *Mingay* objected that the bill of sale should have been registered pursuant to Lord *Hawkesbury's* act (a).

LORD KENYON. These are vessels for inland navigation only, and are not within the intent and meaning of my Lord *Hawkesbury's* act, which was made for a very different purpose.

Both these objections being overruled, the parties agreed to refer the quantum of damages to Mr. *Lowten*.

(a) 26 Geo. 3. c. 60. *Vide Rolleston and Others v. Hibbert and Others*, 3 Term Rep. 406.

Friday,  
July 13th.  
At Guildhall.

### BALCETTI v. SERANI and Another.

In an action against the acceptor of a bill of exchange who defends himself on the ground of his acceptance being forged by A. evidence that A.

IN this action, which was brought by the Plaintiff as indorsee against the Defendants as acceptors of a bill of exchange, the Defendants attempted to prove that the acceptance was a forgery of *Latilla* the drawer, who had been clerk to the Defendants.

Several witnesses were called, who swore that they did not believe the acceptance to be the hand-forged his acceptance to another bill and absconded on that account is not admissible.

hand-writing of either of the Defendants, and pointed out the difference between this and other acceptances of the Defendants. To corroborate this testimony, the Defendant's counsel called a witness to prove that *Latilla* had forged the Defendants' name to another acceptance, and had absconded to avoid the consequence of a prosecution for that offence.

The Plaintiff's counsel objected to this evidence being received.

*Erskine* and *Garrow*, for the Defendants, contended it was admissible. Though not of itself evidence, yet coupled with the evidence before given, it tended to shew that the probability of truth was in favour of those witnesses who had sworn they did not believe the acceptance to be the Defendant's hand-writing, and much fortified their testimony. *Garrow* mentioned the case of one *Lambe*, who was tried in *Surrey* for forgery. The offence charged upon him was forging a bank note. The note in question was found to have been traced with a camel-hair pencil, and amongst other evidence, to fix the offence upon the Defendant, drawings by him in *India* ink of the *Britannia*, &c. of a bank note were produced. This they contended was similar to the present case.

BULLER, J. (who to-day sat for Lord *Kenyon*) said he thought the case cited was not in point; there the charge was against the person in whose custody the papers were found, and they were connected with the particular fact with which the prisoner was charged. But in this case the Plaintiff

is an innocent indorsee, and the evidence offered only goes to affect the general character of *Latilla*, but does not touch this particular bill.

The Plaintiff recovered a verdict (a).

(a) *Vide Graft v. Lord Brownlow Bertie. Peake's Evid.*  
[103] 105. Note (c). *Viney v. Barrs*, 1 *Esp.* 293. *S. P.*

### CORDRON v. Lord MASSERENE.

A sheriff's officer who discharges a Defendant on payment of the sum sworn to, and is afterwards obliged to pay the residue of the debt, may recover it from the Defendant as money paid to his use.

*ASSUMPSIT* for money paid, laid out and expended. The Plaintiff being a sheriff's officer had arrested the Defendant on a writ against him. The writ was indorsed for bail for £306. 11s. (the sum for which the bond was given), and on the Defendant paying the Plaintiff this money and the costs, he discharged him. The sheriff was afterwards called upon to return the writ, and the Plaintiff in the original action insisting on being paid his interest, the present Plaintiff paid that money to prevent an attachment being sued out against the sheriff. The present action was brought to recover this money.

The Defendant's counsel contended that this action could not be maintained. 1st. They said [ \* 144 ] that this \* payment was merely voluntary. The Plaintiff had not been compelled to pay it, nor could he, for he was not liable to more than the sum sworn to. 2dly. That this was within the rule

rule laid down in *Eyles* and *Faikney* (a), for the Plaintiff had no authority to discharge the Defendant

(a) *EYLES v. FAIKNEY*, K. B. Easter Term, 32 Geo. 3.

The Defendant being a prisoner in the custody of the Plaintiff (who was warden of the Fleet prison) on meane process at the suit of one *Holland*, a written authority came from *Holland* to the Plaintiff to discharge the Defendant out of his custody; but *Molloy*, the plaintiff's deputy, having doubts as to the authenticity of the discharge, applied to *Holland* to know whether it was his hand-writing. *Holland* confessed that he had signed the paper, but said that he had been imposed on by the Defendant, and therefore countermanded the authority. The Defendant insisted that the authority to discharge him was irrevocable, and threatened *Molloy* with an action if he detained him; and *Molloy* thinking that *Holland* could not revoke his order, discharged the Defendant out of his custody. *Holland* afterwards brought an action in the Common Pleas against the Plaintiff for an escape, and recovered a verdict and £300 damages, to recover which money the present action was brought as for money paid, laid out and expended to the use of the Defendant.

The cause was tried before Lord *Kenyon*, at *Westminster*, and his Lordship being of opinion that the Plaintiff had been guilty of a breach of his duty in permitting this Defendant to escape, and therefore ought not to be permitted to come as a Plaintiff into a court of justice, ordered him to be called.

On a former day *Holroyd* had moved for a new trial, and obtained a rule to shew cause, which rule coming on, *Law* and *Holroyd* contended that this was not a *voluntary* but a *negligent* escape. They cited *Moore*, 597. to shew the difference between a *voluntary* and a *negligent* escape, and contended that though the Plaintiff's ignorance of the law was no answer to *Holland's* action, yet it shewed that he did not suffer the Defendant to escape from a corrupt motive, and therefore he ought to recover in the present action. In the case of *The Sheriffs of Norwich v. Bradshaw*, Cro. Eliz. 53. and *Godb.* 125. the Court held that a



fendant without the consent of the Plaintiff in the former action, or his attorney.

BULLER,

sheriff from whom a prisoner had escaped, might maintain an action immediately after the escape, though no action had been brought against him.—Though *Holland* had not, yet he probably might have recovered the whole of his debt against the present Plaintiff. This would have been a discharge of the Defendant for the whole debt, and the present verdict is a discharge *pro tanto*. In a case which arose some years since, the Court held that the recovery of a penalty against a servant, was a bar to any action against the person who seduced him from his master's service. See *Bird v. Randall*, 3 Burr. 1345. So it has been held that if an action is brought to recover treble damages for not setting out tithes, the Plaintiff cannot afterwards bring an action to recover the tithes, *Sir Richard Champernon v. Hill*, Yelv. 63. Had the Plaintiff voluntarily permitted the Defendant to escape, on a promise to pay him a sum of money, or to indemnify him, it would have been a very different case, for the Plaintiff would have been guilty of a gross violation of his duty. But even supposing this to have been what the law calls a voluntary escape, still they contended that the Plaintiff might recover this money. In a case of *Morris and Bulkley*, tried before Mr. J. Yates, at Worcester Lent Assizes, 1765, that Judge held that if a sheriff voluntarily permitted a prisoner to escape, he might recover the money which he was obliged to pay, in an action against the prisoner for money paid to his use, and Mr. J. Gould was of the same opinion.

*Erskine*, for the Defendant, shewed cause against the rule. He observed that to make an escape voluntarily it was not necessary that the gaoler should have a corrupt intention; if it was by his consent, it was sufficient. No escape could be called merely negligent, unless effected by the pure act of the prisoner, without the knowledge, and against the consent of the gaoler. *Ex dolo malo non oritur actio*. He was proceeding, when he was stopped by the Court, who said "the rule must be discharged."

In *Pitcher v. Bailey*, 8 East, 171. the Court, on the authority of this case of *Eyles v. Fuikney*, determined that a sheriff's officer

BULLER, J. This is not a voluntary payment ; the Plaintiff would have been obliged to pay the whole sum due, by law, for though bail above cannot be \* charged with more than the sum sworn [ \* 146 ] to, yet it is not so with the sheriff or the Defendant, against whom the Plaintiff may recover the whole of his debt (a). To bring this within the case of *Eyles* and *Faikney*, the Defendant should shew some improper conduct in the Plaintiff, and then I admit the rule that a Plaintiff must draw his justice from pure fountains would apply : but if I were to determine that the Plaintiff had done wrong in this case, I must say that a sheriff's officer could not in any case receive the debt and costs and discharge the Defendant, which might be attended with very mischievous consequences to Defendants.

Verdict for the Plaintiff (b).

officer who permitted the Defendant to go at large on his bare promise to pay the debt to the creditor, in consequence of which he (the officer) was obliged to pay, could not recover it from the original Defendant.

(a) *Gabel v. Perchard*, 2 *Anstr.* 522. *Fowlds v. Mackintosh*, 1 *H. Blac.* 233.

(b) *Vide Rogers v. Reeves*, 1 *T. Rep.* 418.

GRELLIER

*Saturday,  
July 14th.  
At Guildhall.*

**GRELLIER v. NEALE and Others.**

If the Defendant's hand-writing to a deed is proved, the Jury may presume the sealing and delivery.

*ASSUMPSIT* for goods sold and delivered. The goods were sold to *William Neale* the first Defendant, and *Redhead*, in whose names the business was carried on, but the Plaintiff, discovering that the other Defendants were dormant partners, brought this action against all.

[ \* 147 ]

\* To prove a partnership deed, the Plaintiff's counsel called the subscribing witness, who said she did not see the deed executed, but that *William Neale* brought it to her, and desired her to put her name thereto as a subscribing witness, which she did, none of the other Defendants being present. The Plaintiff's counsel then offered to call witnesses to prove the hand-writing of the other Defendants, which the Defendant's counsel objected to; contending that as it was a deed under seal, bare proof of the hand-writing was not sufficient, but sealing and delivery must be proved.

Lord KENYON. The subscribing witness not having seen the deed executed, it is the same as if there was no witness at all; and in that case the hand-writing may be proved by another witness. As to the objection that the sealing and delivery ought to be proved, I am clearly of opinion, that if the signature is proved to be the Defendant's hand-

hand-writing, we ought to presume that it was sealed and delivered (a).

The Plaintiff then proved the hand-writing, and obtained a verdict.

Mr. *Bearcroft*, one of the Plaintiff's counsel, said it was a point which had been frequently ruled.

(a) *Vide Dougl.* 206. *Fasset and Another v. Brown*, ante, 23. acc. *Bull. N. P.* 254, *contra*. So the admission of the hand-writing of an attesting witness to a bond presumptively admits that it was delivered as the obligee's deed, *Milward v. Temple*, 1 *Camp.* 375. A person who sees an instrument executed, but is not desired to attest it, cannot, by afterwards putting his name to it, prove it as an attesting witness; and therefore, if the name of another person appears on the instrument as a witness, he must be called, *McCraw v. Gentry*, 3 *Camp.* 232. See the cases collected, *Peake's Law Evid.* [98] 100.

SMITH *v.* The Company of ARMOURERS and  
BRAZIERS of the City of London.

Monday,  
July 16th.

A *MANDAMUS* had issued to the Defendants, commanding them to admit *Edward Smith*, the Plaintiff, a freeman of the company of Armourers and Braziers.

To this *mandamus* the Defendants returned, that the said *Edward Smith* was not duly qualified

within the 5 *Eliz.* though he was never engaged in the manual labour of the business.

A man who has been engaged as a chief clerk and manager to a manufacturer for seven years, has served a sufficient apprenticeship

to

to be admitted a freeman, not having served an apprenticeship according to the stat. of *Elizabeth (a)*. The Plaintiff pleaded to this return and joined issue thereon.

It appeared, that the Plaintiff had never been bound apprentice, nor even worked at the trade. He, in the year 1775, went to live with Messrs. *Thoytes & Co.* who were very large founders in the city, as clerk and packing porter; he continued with them for 15 years, during the greatest part of which time he conducted the whole of their extensive works, received all the orders, gave directions to the workmen, &c. but never was engaged in the manual labour of the business. All the witnesses said he knew how to *conduct the business* as well as any master in *London*, but that he did not know how to manufacture the commodity by his *own personal labour*. During some part of the time he was with Messrs. *Thoytes & Co.* he was under articles of agreement, but such articles were never for a longer term than 2 years, at the end of which time they were renewed.

[ \* 149 ] It was objected by the Defendant's counsel, that this was not a sufficient apprenticeship to entitle the \* Plaintiff, by the general law of the land, or the customs of the city, even to exercise his trade; and therefore that he could not be admitted of the company.

Lord *Kenyon*. I am of opinion, that there has been a sufficient apprenticeship within the stat. of

(a) So much of this statute as relates to apprentices is repealed by stat. 54 G. 3. c. 196.

the 5th of *Eliz.* to entitle this person to exercise his trade. When that act was made, those who framed it might find it beneficial, but the ink with which it was written was scarce dry, ere the inconvenience of it was perceived; and Judges falling in with the sentiments of policy entertained by others, have lent their assistance to repeal this law as much as it was in their power. Very soon after this statute was made, the Duke of *Alva's* persecutions in the *Netherlands*, under that monster *Philip* the Second, brought over an immense source of industry to this country; all the manufacturers being driven from their own. Then the inexpediency of this statute was sufficiently felt, and so strictly has it been construed, that it has even been determined that a man carrying on *one* business for seven years without any effective prosecution, has served a sufficient apprenticeship to enable him to carry on, not only that one trade (*a*) but *any* other. There is no particular custom stated in this case, so that it must entirely rest on the statute; and I am clearly of opinion he is not within it. The reason for making it was, that bad commodities might not be spread abroad; but natural reason tells us, that if the manufacture is not good, there is no danger of its having a favourable reception in the world, or answering the tradesman's purpose.

Verdict for the Plaintiff (*b*).

(*a*) *Vide Walter qui tam v. Holton*, 1 *Black*. 233. *French qui tam v. Adams*, 2 *Wils.* 168. *Regina v. Maddox*, *Salk.* 613. 4 *Leon.* 9.

(*b*) *Carth.* 163. *Show.* 242. A wife who has assisted her husband seven years may carry on trade. And see *Peaks v. Johnson*, *Hil. 1 Ann.* cited *B. N. P.* 193.

CATLEY

## \* CATLEY and Another v. WINTRINGHAM.

[ \* 150 ]  
*Tuesday,*  
*July 17th.*

By the custom of the river *Thames* the master of a vessel is bound to guard goods loaded into a lighter, sent for them by the *consignee*, until the loading is complete, and cannot discharge himself from that obligation by telling the lighterman he has not sufficient hands on board to take care of them.

*ASSUMPSIT* against the Defendant, as master of the ship *Betsey*, for not safely conveying a quantity of tallow from *St. Petersburg* to *London*, and delivering it to the Plaintiffs there.

The Plaintiffs were consignees of the tallow in question; and the ship having arrived in the *Thames*, they sent a lighter to fetch the tallow from her. The lighter came on the *Saturday*, but the lighterman was then told, by the people on board the ship, that the tallow could not be put on board till the *Monday* following, at which time they desired him to call for it. He left the lighter lashed to the ship, and went again on the *Monday*, but not above half the tallow being put on board, he again left the lighter. In the following night the lighter was cut from the ship, and part of the tallow, to the value of £82, stolen thereout.

The Plaintiffs were proceeding to call witnesses to prove that, by the custom of the river, the lighters were left by the side of the ship till completely loaded, and that the captain of the ship was obliged to watch them during that time; but they were stopped by the Jury (which was a special one) who said they well knew the custom to be so.

In answer to this case, the Defendant proved that when the lighterman came on the *Monday*, he told him he could not guard the lighter, not having a sufficient number of hands on board for that

that purpose, but the lighterman left the lighter without returning any answer.

\* Lord KENYON. The custom of the river must [\* 151] undoubtedly govern the parties. There might have been a special contract, limiting the Defendant's duty, but he could not do that by any act of his own without the consent of the other party (a).

Verdict for the Plaintiffs.

(a) In the above case it seems to have been admitted that the master of the ship was only liable till the goods were fully loaded on board the lighter, but it has been since much contested whether the master is by the usage bound to take care of the lighter after it is fully laden until the time when it can be properly removed from the ship to the wharf. In a late trial on the question, it was held that the master was not obliged to do this, *Robinson v. Turpin*, *Guildhall*, sittings after *Trinity* term, 1805, cor. *Ellenborough*, C. J. The action was brought by the owner of the goods against the lighterman, and the plaintiffs obtained a verdict. In a former trial, before Sir *J. Mansfield*, they had been nonsuited. See also *Sparrow v. Carruthers*, 2 *Str.* 1236. *Harry v. Royal Exc. Ass. Co.* 2 *B. and P.* 430. In *Strong v. Natally*, 1 *Bos. and Pul. N. R.* 16. a policy being made on goods "until the cargo should be discharged and safely landed;" the goods were put on board a lighter and brought to the wharf of the consignee, but not landed on account of the rough weather. The consignee then discharged the lighterman, and undertook to see to the landing himself; and the lighter being afterwards sunk and the goods thereby lost, it was held that by this act of his own the consignee had discharged the underwriters, who would otherwise have continued liable.

TIDSWELL



Wednesday,  
July 18th.

TIDSWELL v. ANKERSTEIN.

An executor in trust has a sufficient interest to enable him to make assurance in his own name, on the life of a person who has granted an annuity to the testator.

THIS action was brought on a policy of insurance on the life of *Wm. Holden*, late *Shuttleworth*, from the 17th of *August*, 1790, to 17th of *August*, 1791, both days inclusive, and during the life of the Plaintiff; but in case the Plaintiff should depart this life before *Wm. Holden*, the policy to be void.

*Holden* had granted an annuity to the Plaintiff's late brother; which annuity he had bequeathed to persons not parties to this insurance, having made the Plaintiff executor of his will, and directed him to make assurance.

*Erskine*, for the Defendant, objected that the Plaintiff had not such an interest as enabled him to insure this life. The real interest is in the persons to whom the annuity is bequeathed, and the act of parliament (*a*) directs, that all insurances shall be made for the benefit of the person interested. Here the insurance is made by a person having no beneficial interest; and had the Plaintiff died before the person whose life is insured, the insurance would have been gone.

[ \* 152 ] \* Lord KENYON said, he thought this a sufficient interest to support the action. The Plaintiff could not assent to the legacy before the testator's debts were paid, without being guilty of a *devastavit*,

(a) 14 Geo. 3. c. 48. s. 1, 2, 3.

and

and being executor, all the interest of the testator vests in him.

The cause proceeded, but it appearing that *Holden* was in a dying state when the policy was effected, the Defendant had a verdict (a).

(a) In *Pritchett v. Waldron*, 5 *T. Rep.* 14. the Court of King's Bench held that a trustee, in whom the legal estate was vested, might maintain an action against the hundred for the riotous demolition of a house.

# C A S E S I N K. B.

AT THE SITTINGS

AT NISI PRIUS,

AFTER MICHAELMAS TERM, 33 GEORGE III. 1792.

*Monday,  
Dec. 3d.  
At West-  
minster.*

WELLER *v.* The GOVERNORS of the  
FOUNDLING HOSPITAL.

Mere trustees of a public charity are good witnesses in an action brought against *themselves* in their corporate capacity.

*ASSUMPSIT* for work and labour. The Plaintiff had been employed to dig a well and to put down a pump at the Hospital. When the pump had been put down, the water was very bad, and the only question in the cause was, whether the water was spoiled and made fetid by the wooden pump, or whether it was bad from any other cause. If the former should be found to be the case, the Plaintiff had agreed to take back the pump.

Most of the witnesses called on behalf of the Defendants were Governors.

*Mingay*, for the Plaintiff, objected to their competency, not on the ground of interest, but because they were Defendants on the record.

Lord

LORD KENYON was of opinion, that they were nevertheless good witnesses. His Lordship said they were sued in their corporate, and not in their natural and individual capacities. That this case was different from the case of a Mayor and Citizens, because though sued in their corporate name, they might still have a great interest in the event of the cause; for instance, a citizen of *London* had great and important rights to support; but these Defendants had not the least personal interest; they were mere trustees of a public charity.

The Defendant's case was clearly proved, and LORD *Kenyon* being of opinion, that the Plaintiff was intitled to be paid for digging the well, though not for the pump; it was agreed to refer the question, whether a sufficient sum of money had been paid the Plaintiff, to arbitration (a).

(a) But see *Rex v. Saint Mary Magdalen, Bermondsey*, 3 East, 7. where certain persons being by act of parliament appointed Governors and Directors of the Poor, and made liable upon appeal against the rate to the payment of costs in case of the appeal being allowed; they were holden not to be witnesses in such appeal; though they were, in truth, only Trustees, and entitled to be reimbursed such costs out of the parochial fund; for being parties in the cause they were individually liable to costs in the first instance. *Vide Peake's Law Evid.* [149] 157.

Tuesday,  
Dec. 4th.

GRAHAM and Others v. HOPE and Others.

When partners dissolve their partnership, they should send notice to all persons who have trusted them as partners; a notice in the *Gazette* is not sufficient to discharge them as against those persons who have not seen it.

THE Defendants had been in partnership together, and the Plaintiff had sold them goods as partners. Afterwards the partnership was dissolved, and notice of the dissolution given in the *London Gazette*; and after this notice, the Plaintiff had sold and delivered the goods for which the present action was brought.

The Defendants called witnesses, who swore that a notice had been given to the agent of the Plaintiff, that the partnership was dissolved. The agent on \* the contrary positively swore that he had received no such notice.

[ \* 155 ]

Lord KENYON told the jury, that the cause depended entirely on the credit they gave to the witnesses on the one side and the other. The *Gazette*, he thought, was not *of itself* sufficient notice to the Plaintiff of the dissolution of the partnership. His Lordship said he did not say this for the purpose of this cause merely, but meant to lay it down as a general rule to govern the conduct of all men. Many people there were in this kingdom who never saw a *Gazette* to the day of their deaths, and very mischievous would be the consequences if they were bound by a notice inserted in it. It was incumbent on persons dissolving a partnership, to send notice of such dissolution to all the persons with whom they had had dealings in partnership.

The

The Jury, believing the Defendants' witnesses, gave a verdict for the Defendants (a).

(a) *Vide Gorham and Another v. Thompson and Another*, ante, 42. which seems at first sight to imply that the mere publication of an advertisement in the *Gazette*, is sufficient proof of notice in all cases; and the same doctrine is to be collected from Mr. *Espinasse's* note of *Godfrey v. Turnbull and M'Cauley*, vol. i. page 371. though according to my note of that case, the extent of the determination was, that the publication in the *Gazette* might be left to the Jury as evidence of notice; but was not conclusive of that fact. The notes of that case so materially differing, I insert mine verbatim, as taken at the time.

GODFREY v. MACAULEY and Another, *Guildhall*, Sitting after *Trinity* Term, 35 Geo. 3.

*Assumpsit* on a promissory note.

The note in question was dated 6th of *April*, 1793, and made by the Defendant *Macauley*, in the partnership name of *Macauley* and Co. in consideration of a sum of money then advanced to *Macauley*. *Macauley* had suffered judgment by default, the other Defendant had pleaded the general issue.

Previous to the time that this note was given, viz. on the 19th *March*, 1793, the Defendants had dissolved their partnership, and in the *Gazette* of that day an advertisement of such dissolution was inserted.

*Erskine*, for the Plaintiff, contended, that the *Gazette* was not of itself conclusive evidence of the Plaintiff having had notice of the dissolution, and cited *Graham v. Hope*, but Lord *Kenyon* saying, he agreed in opinion that the *Gazette* was not conclusive, he did not state the circumstances of that case.

It appeared that the Plaintiff lived in *London*, and took in two daily Papers, but not the *Gazette*.

Lord KENYON said, that the *Gazette* was not evidence of notice any more than any other newspaper, unless in the cases where, by Act of Parliament, it was directed to be conclusive, such as bankruptcies; decrees of the Court of *Chancery* and

others, some of which even extended to make a man guilty of felony or treason. But in all cases, if published in the neighbourhood of a person, it ought to be left to the Jury, whether he had notice of it or not. His Lordship said, he remembered a case on the Circuit at *Hereford*, where a large sum of money was offered in an advertisement for apprehending a felon; it was proved that the newspaper, which contained the advertisement, was circulated in the neighbourhood of the person in whose name it was published. It was left to the Jury to determine whether he knew of it, and they found for the Plaintiff. So here, if it is probable that the Plaintiff saw this *Gazette*, it may be ground for the Jury to find for the Defendants. The Defendants were not obliged to give actual notice to every person in the world. The Jury will consider whether the Plaintiff knew of it or not.

Verdict for Defendant.

Many other cases have of late years occurred upon this subject. In *Jenkins v. Blizard*, 1 Stark. 419. Lord *Ellenborough* ruled, that proof of the insertion of a notice of dissolution, although but once, in a newspaper which the party was in the habit of taking in, and which was left at his house in the usual course, was evidence to be left to a Jury, without strict proof of the particular paper ever having come to his hands. But in another case he held, that evidence of such insertion was not admissible without proof that the paper was taken in by the party, though the mere insertion in the *Gazette* was admissible without such proof, but that even an insertion in that publication was but weak evidence unless it was proved that the party was in the habit of reading the *Gazette*. *Leeson v. Holt*, 1 Stark. 186. where the minute for advertising a dissolution of partnership in the *Gazette*, signed by the parties, is produced as evidence of an actual dissolution, it requires an agreement stamp, per Lord *Kenyon* in *May v. Smith*, 1 Esp. 283. 89. *Aliter* where the minute recites that the partnership had been dissolved, per Lord *Ellenborough* in *Jenkins v. Blizard*, *ub. sup.* *Doe v. Miles*, 1 Stark. 181. An alteration in the printed cheques is a sufficient notice of a change in the firm of a banking-house to customers who have used the new cheques. *Barfoot v. Goodall*, 3 Camp. 147. where a Plaintiff who knew that an intention between partners to dissolve the

the

the partnership was in a course of execution, afterwards insists upon the continuance of the partnership, it lies upon him to shew that the intention has been abandoned, *Peterson v. Zachariah*, 1 Stark. 71. Notice by a co-partner that the partnership has been dissolved, is evidence as against him that it has been dissolved by competent means, and therefore is evidence of a dissolution by deed, if a deed be essential to such dissolution, per Lord *Ellenborough*, C. J. in *Doe v. Miles*, *ub. sup.*

# REX v. M'CARTHER.

Friday,  
Dec. 7th.

THIS was an indictment for perjury committed on the trial of an information in the Exchequer, against one *Gibb* for concealing soap.

The indictment stated, that the Defendant was sworn upon the holy gospels of God. It was proved, that the Defendant was first sworn on the Testament, in the usual form, but the *Solicitor General* \* understanding that the Defendant was a member of the kirk of *Scotland*, desired he might be sworn by holding up his hand (a), and the oath was so administered.

*Garrow*, (who at the desire of Lord *Kenyon* took the defence on himself, the Defendant not having any counsel,) objected, that this was a fatal variance. The indictment should have stated, that he was sworn by holding up his hand, for though he was first sworn in the usual way, it was not under the sanction of that oath he gave his evi-

If a witness who is a Scotch covenanter be sworn on the Testament, and afterwards at the desire of the counsel, according to the ceremony of his own country, he may be indicted as having sworn on the Testament.

[ \* 156 ]

(a) *Vide Mee v. Reed*, ante, 23.



dence, and therefore he could not be indicted for perjury on that oath.

Lord KENYON observed, that the indictment would have been sufficiently certain, if it had only stated the Defendant to have been in due manner sworn. If the Defendant had only been sworn according to the form of *Scotland*, this would have been a good objection; but as in the present case the Defendant had suffered himself to be sworn in the usual way without objection on his part, he would not suffer him, by acting the hypocrite, to escape punishment.

The Defendant was convicted.

*Monday,  
Dec. 10th.  
At West-  
minster.*

BERRY and Another v. BANNER and  
Another.

On an issue whether a church-warden ought to be elected by the select vestry, a record between a former church-warden and another person is admissible evidence.

[ \* 157 ]

THE Plaintiffs declared in prohibition, and by their declaration alleged, that “ there was, and  
“ from time whereof the memory of man, &c. \*  
“ had been within the parish of *St. Martin in the*  
“ *Fields* in the county of *Middlesex*, a vestry of  
“ the said parish, composed of a *certain* number of  
“ *select* persons parishioners and inhabitants of the  
“ said parish for the time being, called a *Select*  
“ *Vestry*; which said *select vestry* for the time  
“ being, during all the said time immemorial, on  
“ *Easter Monday* in every year, had been accus-  
“ tomed

“tomed to nominate and elect, and of ancient right and custom ought to nominate and elect, two parishioners and inhabitants of the said parish, to be and serve the office of church-wardens of the said parish of *St. Martin in the Fields*, for one year then next ensuing; which said persons, being parishioners and inhabitants of the said parish, so nominated, elected and chosen by the said *select vestry*, and none others, had, for and during all the time aforesaid, been duly sworn into, and served and executed, and by right of custom ought to have served the office of church-wardens of the said parish.”

The declaration further stated, that the Plaintiffs were duly elected church-wardens by the select vestry, sworn into that office, and were entitled to sit in a pew in the parish church appropriated for the use of the church-wardens; nevertheless, that the Defendants had wrongfully drawn the Plaintiffs into a plea in the Spiritual Court; claiming a right to the said pew as church-wardens of the said parish.

If in pleading, it is stated, “that from time immemorial there had been a select vestry composed of a certain number of select persons,” it is incumbent on the party making that averment to prove that the vestry has consisted of a definite number.

So if it had been stated that the vestry was composed of a certain select number of persons *commesemble*. A select vestry cannot be constituted by a faculty from the Bishop.

The Defendants pleaded the general issue; and for a writ of *consultation* said, that the right of election was in the parishioners at large, and that they were elected by them, and duly sworn into their office, and traversed the custom set out in the declaration.

\* The Plaintiffs, as a part of their evidence, offered the copy of a judgment in this Court, in *Trin.* term 14 & 15 G. 2. between *Wm. Kendal* and *Sir Henry Penrice*, the Official to the then Archdeacon

[ \* 158 ]

deacon of *Middlesex*. That was an action for a false return. The Plaintiff *Kendal*, and one *Tucker*, had been elected by the parishioners at large; and the select vestry had chosen the said *Tucker* and *Wood*. But the right of election then being disputed, Sir *Henry Penrice* refused to swear in either set of church-wardens, and left them to apply to this court for a *mandamus*, which they accordingly did, and both obtained writs. The official swore in *Tucker* and *Wood*, and to the *mandamus* to swear in *Tucker* and *Kendal* returned that he had already sworn in *Tucker* and *Wood* as the church-wardens elected by the vestry. Upon which *Kendal* brought the action, and upon the trial, a verdict was found for the Defendant.

*Erskine*, for the Defendants, objected that this being *res inter alios acta*, could not be evidence in this cause.

LORD KENYON. I am clearly of opinion it is evidence. I will not say whether it is *conclusive* or not. In questions of custom, such evidence is always admitted. If a right of common is claimed under a custom, and one person brings an action, the record in that cause is evidence between other parties (*a*). If any fraud can be shewn that will destroy the effect of it; but if unimpeached, it is evidence very near conclusive, if not quite so.

[ \* 159 ]      \* The Plaintiffs also proved a copy of judgment in *Hilary* term 1744, on a feigned issue, between *Ferrers* and *Nind*, “ whether there then was, and

(*a*) *Carth.* 181. *Bull. N. P.* 233.

“ from

“ from time, &c. had been a vestry of the said  
“ parish, composed of a *certain* select number of  
“ persons parishioners of the said parish for the  
“ time being.” Which was found in the affirmative.

Many entries in the parish books from the year 1625 to 1700, were read ; from all which it appeared that the vestry was select, but that sometimes a *larger* and at other times a *smaller* number of the inhabitants attended.

*Erskine* here objected, that though the Plaintiffs had proved that there was a select vestry, yet it was not proved that the vestry was composed of any *certain* definite number, but that on the contrary all the evidence shewed that the number was indefinite.

*Bearcroft*, for the Plaintiffs, endeavoured to answer the objection by saying, that the word *certain* did not oblige the Plaintiffs to prove a definite number. That the sum and substance of the allegation was, that there had been a select vestry. But that whichever way it was taken, there was evidence to go to the Jury, for that the words of this record, that the vestry was composed of a *certain* number of *select* persons, were synonymous with those used in the record between *Ferrers* and *Nind*, that it was composed of a *certain select* number of persons.

Lord KENYON said, he thought it was an objection which could not be got over ; upon which the Plaintiffs called a witness to prove that the select vestry had for some time consisted of 49.

The

[ \* 160 ]      \* The Defendants then proved a faculty from the Bishop of *London*, dated 28th of *June*, 1662, whereby he granted and *confirmed* to them that they should be a select vestry to consist of 49. They also examined some witnesses to prove that it was generally understood in the parish that the number of 49 was only established by the faculty.

*Bearcroft*, in his reply to the Jury, still contended that no precise definite number need be proved to sustain the issue. Suppose this had been in *Latin*, as legal proceedings formerly were, it would have been *quidam numerus*, this means no more than "a number," but lawyers when expressing that in *English*, could not so well do it, without literally translating it, and saying a *certain* number. When we speak of a *certain* man in telling a story, we mean some human being, but no one particular person. He then contended, that the evidence he had adduced proved that a vestry, consisting of 49, existed before the faculty was granted; and that if this was an averment, that the vestry was composed of a *settled, definite* number, the record in the former cause equally contained such an averment.

Lord KENYON (to the Jury). At the time I interposed, I had an idea that the Plaintiffs on this issue, must prove that the vestry consisted of a *certain* number. I still retain that opinion. The question for you to consider is, whether the Plaintiffs have made out a *certain* number. There are some things respecting the good government of the church, which belong wholly to the ordinary; the  
disposal

disposal of seats, where there is no prescriptive right, the ordering of \* devotion, &c. But by the common law, all the parishioners who pay scot and lot have a right to be of the vestry. By immemorial custom this right may be restrained to a select number, and it is highly convenient in populous parishes that it should be so; but still it cannot be done but by immemorial custom. The faculty *proprio vigore*, is a dead letter, though it may be evidence of the antecedent right. Mr. *Bearcroft* very properly got up and said he would give proof of a *certain* number, and admitted that the faculty was not sufficient of itself. The word *grant* in the faculty seems to introduce something new, but the word *confirm* supposes an antecedent custom. I have no doubt but there is a select vestry; the only question is, whether there is any slip in the proceedings. I am not sure that there is any difference in the words of these two records; I rather think the former verdict is evidence of a *certain* select number. In 1625, persons were elected in the place of persons dead, it therefore shews a *certain* number, or why say, in the *place* of others. If you think the *faculty* only fixed a *certain* number, you must find for the Defendants: If the verdict in 1744, and the other evidence, prove a *determinate* number from time immemorial, the Plaintiffs are entitled to your verdict. It is for you to decide.

The Jury found a verdict for the Plaintiffs (a).

(a) *Vide 4 Burn's Eccl. L. 8. 9.*

Wednesday,  
Dec. 12th.  
At Guildhall.

AITCHESON and Another v. MADOCK, Gent.  
One, &c. and Another.

Hair powder made of starch ground fine, still remains starch; and packages of more than 28lb. weight removed from one place to another must be marked as starch.

THIS action of *assumpsit* was brought against the Defendants for negligence as attornies in commencing an action against excise officers, for seizing a quantity of hair powder belonging to the Plaintiffs, without giving the previous notice required by law.

The declaration stated, that before the making of the promise, a large quantity, to wit, &c. of hair powder belonging to the Plaintiffs had been *unlawfully* seized by the officers; and in consideration that the Plaintiffs would retain and employ the Defendants as their attornies, to bring an action against the persons who had made the seizure, they promised to conduct themselves properly, &c.

The Plaintiffs proved that the powder in question, which had been brought in hogsheads from *Scotland to England*, was in fact seized.

The Defendants' counsel objected, that it was not proved the seizure was unlawful. In answer to which Lord *Kenyon* said, he would presume the seizure unlawful until the contrary was proved.

The Defendants then proved that the powder was in fact nothing more than starch ground fine, without any other ingredient. By the act of the 24 *Geo. 3. c. 48. s. 4.* it is enacted, that "when any starch exceeding the quantity of 28lb. weight,

“ weight, shall be removed or carried by land or  
 “ water, the word *starch* shall be painted or marked  
 “ in legible letters of at least three inches in length  
 “ on every chest, *cask*, sack or package, wherein  
 “ such starch shall be \* contained, and any starch [ \* 163 ]  
 “ exceeding, &c. which shall be found removing,  
 “ or carrying, or removed or carried by land, &c.  
 “ in any chest, &c. not having the word *starch* so  
 “ painted or marked thereon, shall be forfeited,  
 “ together with the chest, &c. containing the  
 “ same, and the boat or vessel, horses or other  
 “ cattle, waggon, &c. made use of in removing or  
 “ carrying the same ;” and this powder not being  
 so marked, the Defendants’ counsel contended,  
 that it was subject to seizure, and the averment  
 that it was *unlawfully* seized was disproved.

The Plaintiffs’ counsel insisted, that though nothing was added to the starch, it had still become another article, and therefore need not be marked.

Lord KENYON said, it still remained starch ; and his Lordship said he believed there was a case some years since in the *Exchequer* before Lord Chief Baron *Skynner*, where Sago powder was found, on investigation, to be composed of starch, and though used for another purpose, still as it had been starch, in the course of the manufacture, it was held liable to the duties on starch (a). The Plaintiffs had therefore failed in proving the taking to be unlawful, and must be called.

Accordingly the Plaintiffs were nonsuited.

(a) *Rex v. Stringer, Exch.* See also *Attorney-General v. Green*, 4 Price, 224.



Wednesday,  
December  
19th. At  
Guildhall.

MAUGHAM qui tam v. WALKER.

An account in the hand-writing of the person borrowing money, is no evidence for the lender, in an action for usury brought against him by a common informer.

[ \* 164 ]

**D**EBT on the statute against usury, for taking £50, for a loan of £1000. to *Joseph Ubank* for six months.

\* *John Ubank*, the brother of *Joseph Ubank*, proved the Plaintiff's case. He acted as agent for his brother *Joseph*, and received the money advanced, for his use.

*Erskine*, for the Defendant, offered to produce in evidence an account in the hand-writing of *Joseph Ubank*, wherein he admitted part of this £50. to be paid on the balance of an old account.

Lord KENYON. This is *res inter alios acta*. *Joseph Ubank* is no party to this record; he might be called as a witness and prove this account on oath, but I cannot permit any account of his, not on oath, to be read in evidence. His Lordship further said, that if the case really were as stated by the Defendant's counsel (*Joseph Ubank* being now abroad), the Court ought, in so penal a case as the present, to grant a new trial.

In a penal action the Plaintiff is at liberty to shew the action commenced within a year, as well after as before the objection, that it does not appear on the record, is made.

The bill was not filed within the year, and the Plaintiff's counsel did not produce the writ as a part of their evidence. *Erskine* objected, that it did not appear that the action was commenced within a year; and on *Bower*, the Plaintiff's counsel, then offering to produce the writ, he contended that after the objection was made, it was too late to give this evidence; though that indulgence was allowed

allowed in a mere civil action, yet it was not proper or usual in a penal one.

But Lord KENYON was of opinion that the Plaintiff might prove the commencement of the suit at any stage of the cause; upon which the writ was produced, and it appearing to have been sued out within \* a year after the offence committed, the [ \* 165 ] Plaintiff had a verdict for the penalty of £3000. (a).

(a) This was afterwards compounded. See 5 *T. Rep.* 98.

### SHAW and Others v. MARKHAM, Clerk.

*ASSUMPSIT* against the Defendant as indorser of two promissory notes, drawn by *Thomas Thomas*.

A witness of the name of *Osborne* swore that when *Thomas* dishonoured the note, he wrote three letters to the Defendant to inform him of it, and sent one to his living at *Chester*, another to his living in *Yorkshire*, and a third to the bookseller's where he usually lodged when in *London*. No notice had been given the Defendant to produce these letters, nor any copy kept.

Parol evidence of a letter containing an account of the dishonour of a note of hand, is not admissible, unless notice has been given to produce such letter.

*Erskine*, for the Defendant, objected to the evidence, contending that no notice having been given to produce these letters, the Plaintiff could not give parol evidence of their contents.

*Bower*, for the Plaintiff, answered that the letters themselves were nothing more than a notice, and that

that it was an established rule that no notice need be given to produce a notice (a).

Lord KENYON said, this objection could not be got over, and no evidence of the contents of the letter could be received without a notice to produce it. Call it a notice or by any other name, it was still a letter, and must be proved as any other [\* 166] written paper. The \* Defendant's counsel then consented that the cause should proceed, with liberty for the Defendant to move to enter a non-suit in case the Plaintiffs should be intitled to a verdict on the merits.

It appeared that *Thomas* having compounded with his creditors, he assigned his effects to the Plaintiffs for their benefit; and *it was agreed that Thomas should retain the fixtures and stock in trade* in consideration of which he gave these notes, and the Defendant indorsed them *as his surety*. This was done under the hope and expectation that *Thomas* was to be made a new man by this deed, but some of his creditors, to the amount of about £1000, refusing to come in under the deed, a commission of bankrupt was sued out, and the very fixtures and stock which *Thomas* was to have had, seized under that commission.

On this evidence the Plaintiffs were nonsuited.

(a) In *Hammond and Another v. Plank*, K. B. Sittings at Westminster after East. T. 36 Geo. 3. M. S. Lord Kenyon held, that in an action of trover, it was not necessary to give notice to produce a written demand of the thing for which the action was brought. The cases as to this exception to the general rule are collected in *Peake's Law Evid.* [108] 116.

LEE

## LEE v. HUSON.

Thursday,  
December  
20th.

THIS was an action for a libel. After the libel had been read, the Plaintiff's counsel offered in evidence other letters and papers which also amounted to libels.

In an action for a libel, other papers which are themselves libels on the Plaintiff may be given in evidence to increase the damages.

*Shepherd*, for the Defendant, objected to this evidence, contending that the Plaintiff could not give in evidence any thing which was itself cause for a distinct action. If the other papers might be given in evidence in this cause, the libel for which this action is brought would also be evidence in any action which \* might be brought for the other libels, and the Plaintiff would have damages several times over for the same libel.

[ \* 167 ]

Lord KENYON said, he thought these letters might be received in evidence, though they contained matter which was a ground for another action. His Lordship observed, that in actions for words it was the practice to admit evidence of other words besides those charged in the declaration, and therefore he should receive this evidence (a).

The papers were therefore read, and the Jury found a verdict for the Plaintiff, and £300. damages.

(a) *Sed vide Mead v. Daubigny, ante, 125.* and cases cited in the note there. And *Charlter v. Barret, ante, 22.*

WHITWELL and Others, Assignees, &c. v.  
DIMSDALE and Others.

An agreement not stamped cannot be received as evidence for any purpose whatever, not even to shew that the party meant to commit a fraud by that agreement.

*DETINUE* for the bill of sale of a ship delivered by the bankrupt to the Defendants. Amongst other pleas, the Defendants pleaded one, putting the bankruptcy in issue.

The Plaintiffs offered a paper writing, purporting to be an agreement made between the bankrupt and his sons, by which the former agreed to assign his effects to the latter. It was not stamped.

*Erskine* contended that though not evidence of an agreement, yet this paper might be read to prove that the bankrupt was in a falling state, and had an intention of defrauding his creditors, and said there \* had been a case in which a man was convicted of forging an instrument not stamped (*a*).

[ \* 168 ]

Lord KENYON said he was of opinion that this paper writing could not be given in evidence, *for any purpose whatever*, either to establish or defeat it; nor did he agree with the case cited as to the forgery (*b*).

(*a*) *Hawkeswood's case. Leach, 221.*

(*b*) The point in *Hawkeswood's case* was again discussed in the case of *Gillson*, argued in the *Exchequer Chamber, Michaelmas, 48 Geo. 3.* and this doctrine of my Lord *Kenyon* cited for the purpose of affecting its authority.—The Court, however, held, that the case of *Hawkeswood* was rightly decided, and Mr. *J. Lawrence* mentioned that Lord *Kenyon* himself, in the case

of

The Plaintiffs produced other evidence, and obtained a verdict.

of *Colin Reculist*, 2 *Leach*, Cro. Cas. 811. and in other subsequent cases, approved of the decision in *Hawkeswood's* case. *Vide* 1 *Taunton*, 97. Unstamped instruments have frequently been admitted in evidence for collateral purposes, as in *R. v. Pendleton*, 14 *East*, 449. where it was held, that the Court of Quarter Sessions might look into unstamped articles of agreement to serve for a certain period, for the purpose of seeing when they ceased to operate; and in *Gregory v. Frazer*, 3 *Camp*. 454. where Lord *Ellenborough* held, that an unstamped promissory note might be looked at by the Jury for the purpose of examining whether it appeared to be written by a man in a state of intoxication, and *vide* *Edgar v. Bick*, 1 *Stark*. 464. *Rambert v. Cohen*, 4 *Esp*. 213. *Holland v. Duffin*, ante, 58. *R. v. Pearce*, ante, 75. *Dover v. Mestall*, 5 *Esp*. 93. *Mauley v. Peele*, ib. 121. *Forsyth v. Jervis*, 1 *Stark*. 437.

# C A S E S I N K. B.

AT THE SITTINGS

AT NISI PRIUS,

AFTER HILARY TERM, 33 GEORGE III. 1792.

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*Saturday,  
Feb. 16th.  
At West-  
minster.*

REX v. BUTCHER and Others.

Bail above  
put in by the  
sheriff (who  
had dis-  
charged the  
Defendant  
without a  
bail bond)  
may sur-  
render the  
Defendant.

THESE Defendants were indicted for the rescue of one *Philip Evans* from his bail, when they were going to surrender him in their discharge.

A writ on the Lottery Act requiring bail for £500. had issued out of the Court of *Common Pleas* against *Evans*, and he was arrested thereon by a sheriff's officer of the name of *Coulson*. *Coulson* discharged the Defendant without taking any bail bond; and after the return of the writ, fearing that the sheriff might be called on, prevailed on *Purnel* and *Dennis* to become bail above. They immediately went to take *Evans* into their custody for the purpose of surrendering him. *Purnel* and *Dennis* had never seen *Evans* on the subject of their becoming bail, nor did they even know him. *Evans* on being thus suddenly seized, opposed  
*Purnel*

*Purnel* and *Dennis*, and the Defendant assisted him in making his escape.

*Marryat*, for the Defendants, contended that the sheriff's officer having voluntarily permitted *Evans* to escape, could not surrender him after the return of the writ, either by taking him himself, or in a circuitous way by putting in bail above, and causing them to surrender him.

LORD KENYON. The bail had a right to surrender the Defendant. They were his bail, and whether with or without his consent was immaterial; they had still the right, and they told him they were come for the purpose of surrendering him. If he resisted them it was at his peril: it would be so even in the case of death, and had either of the bail been killed, all the Defendants would have been guilty of murder. They should have submitted, and not taken the law into their own hands.

The Defendants were convicted.

*Vide Berchere et al' v. Colson*, 2 Stra. 876. accord.

# REX v. DOWLIN.

Tuesday,  
Feb. 19th.  
At Guildhall.

THIS was an indictment for perjury, committed on the trial of *John Kimber*, for the murder of a negro

Though to support an indictment for perjury committed

on a former trial the prosecutor must in general prove the whole of the Defendant's examination, yet when the perjury was committed in swearing to a fact not connected with the general merits of the cause, proof of the cross examination only is sufficient.



negro girl on board a slave ship, of which *Kimber* was commander.

Amongst other questions asked the Defendant on his cross examination, one was, "whether he [\* 171] "had not \* declared to Mr. *Jacks* that he would "be revenged of *Kimber*, and work his ruin." He swore he had made no such declaration, and upon that answer perjury was assigned. There were also assignments of perjury on the evidence given by the Defendant as to *Kimber's* treatment of the girl.

The short-hand writer could not prove the whole of the examination in chief, as he had only taken down particular parts of it, but he proved all that was sworn on the cross examination.

Lord Kenyon said, that to convict a Defendant of perjury, he should always require the whole of his evidence to be proved, for a man might explain by one part of his evidence what he had sworn in another; and therefore as to the perjury assigned on the Defendant's evidence concerning *Kimber's* behaviour to the girl, he would not proceed on it. But the question as to what passed between the Defendant and *Jacks*, was entirely unconnected with the original examination. That question could arise on the cross examination only, and every thing which the Defendant swore on that examination being proved, the prosecutor might proceed to falsify it.

The Defendant was convicted on that assignment (a).

(a) *Vide Rex v. Jones, ante, 38.*

[ 172 ]

## HATCHET and Wife v. MARSHAL.

*Friday, Feb.  
22d. At  
Westminster.*

THIS was an action of covenant for non-payment of rent, &c. As to the breach for non-payment of rent, the Defendant pleaded a set-off.

The Plaintiffs had taken out a summons for the particulars of the Defendant's set-off, and obtained a Judge's order thereon. When the Plaintiffs' attorney applied to the Defendant's attorney to comply with the order, he said that the Defendant had delivered the Plaintiffs an account in writing before the commencement of the action, and that he could not give any further particulars than were contained in that account.

The Plaintiffs' counsel objected that the Defendant not having delivered any particular pursuant to the order, could not go into his set-off.

LORD KENYON. This is a virtual compliance with the order. If I were to hold that the Defendant was not entitled to go into his set-off, I should be spreading a net of form to catch the parties. The intent of the order was that the Plaintiff should not be surprised, and when the Defendant refers to another account, that intent is fully answered. I will not permit the Defendant to go out of that account (a).

The

(a) If a bill of particulars state the transaction upon which the Plaintiffs' claim arises, it need not specify the technical description of the right which results to the Plaintiff out of such transaction,

If the Plaintiff obtain an order for the particulars of the Defendant's set-off, and, upon an application to the Defendant's attorney to deliver a particular under the order, he refers to another already delivered by his client, he is not obliged to deliver a fresh particular.

The Defendant had also pleaded an eviction, but that plea not being proved, nor the set-off covering the Plaintiffs' demand, they had a verdict for the balance.

transaction, *Brown v. Hodgson*, 4 Taunt. 189. Nor can the Defendant at the trial of the cause make any such objection to the particulars, which, if made earlier, the Plaintiffs or the Court might have rectified, *Lovelock v. Chevely*, 1 Holt. 55.

[ 173 ]

## WRIGHT and Others v. RILEY.

It is no defence to an action at the suit of the indorsee of a promissory note or bill of exchange that the bill was not stamped at the time of making it, if it has a proper stamp when produced at the trial.

*ASSUMPSIT* against the Defendant as indorser of a bill of exchange, dated 9th September, 1791.

The bill when produced in evidence appeared to be properly stamped, but the Defendant proved that it was not stamped when drawn, nor for some time afterwards.

*Erskine*, for the Defendant, contended that the bill was absolutely void, and could not be made good by the stamp impressed upon it after it was drawn, for by the act of the 31 Geo. 3. c. 25. s. 19. it is enacted that the paper on which any bill is written shall be stamped before the bill is drawn; and that it shall not be lawful for the commissioners of the Stamp Duties to stamp any paper on which such bill shall be written after the same is written thereon.

Lord

LORD KENTON said, that though the Commissioners might have exceeded their duty in stamping the bill against the positive directions of the act of parliament, still that being stamped; he thought it was become a valid instrument, and a Judge at *Nisi Prius* could not enquire how and at what time it was stamped. Much inconvenience might arise, and a great check be put upon paper credit, if the objection was to be allowed, for how was it possible for a man taking a bill in the ordinary course of business to know whether it had been stamped previous to the making of it or not?

The Plaintiffs had a verdict (a).

(a) *Vide stat. 34 G. 3. c. 32. and Roderick v. Hovill, 3 Camp. 103.*

[ 174 ]

### LLOYD v. HARRIS.

*Saturday,  
February  
23d.*

THIS was an action on the case for maliciously holding the Plaintiff to bail for £15. when nothing was due. The Plaintiff proved the affidavit of debt, the writ, and the arrest by the officer, but could not prove the warrant by virtue of which he was arrested.

In an action for a malicious arrest, the Plaintiff must prove the sheriff's warrant on the writ against him.

*Mingay*, for the Defendant, objected that this was a necessary link in the chain of evidence.

*Gibbs*, for the Plaintiff, contended that the sheriff's return of *cepi corpus* appearing on the back

back of the writ, and it being entered in the judgment of *non pros* that the Plaintiff was arrested and held to bail, sufficiently proved the arrest to have been made under the writ.

Lord KENYON said, that as against the present Defendant, this was no evidence of the arrest having been under the writ. The return of *cepi corpus* was made by the sheriff, without any privity of the then Plaintiff, and the judgment of *non pros* was entered by the Defendant in that cause.

The Plaintiff was nonsuited (a).

(a) *Vide Blatch v. Archer, Cowp. 68.*

### GOODACRE v. BREAME.

[ \* 175 ]

A man who is proved to be a partner with the Defendant cannot be examined as a witness to prove that he only is liable.

*ASSUMPSIT* for goods sold and delivered.

The Plaintiff's witness swore that the Defendant and \* his brother *William Breame* were partners in trade, and that these goods were sold to them in partnership.

The Defendant called *William Breame* to prove that the goods were sold to him, and that the Defendant had no concern in the purchase of them, otherwise than as his servant.

Lord KENYON. He is not a witness to prove this; for he comes to defeat the action of the Plaintiff,

Plaintiff, against a man who is proved to be his partner, and by discharging the present Defendant, he benefits himself, as he will be liable to pay a share of the costs to be recovered by the Plaintiff in this cause.

Verdict for the Plaintiff (a).

(a) In this case the witness might have been rendered competent by a release. *Vide Young v. Bairner*, 1 *Esp. Cas.* 103. And in a still later case the Court determined, that when it appears the witness is interested both ways, they could not nicely weigh on which side his interest preponderated; and therefore an indorsee of a promissory note to whom the drawer had given money to take it up, was held to be a competent witness for the Defendant to prove it paid, being either liable to the Plaintiff on the note, or to the Defendant for money had and received. His being also liable in the latter case to the costs of the action was considered as making no difference. *Birt v. Kershaw*, 2 *East*, 458. But see *Jones v. Brook*, 4 *Taunt.* 464. which is stated in note (a), *post*, [224.]

MACDONALD v. STEELE, Esq. and Another.

Monday,  
Feb. 25th.

THIS was an action on the case against the Defendants as paymasters general of the forces, for not giving their draft on the bank for a sum of money due to the Plaintiff for his half pay (a).

The king may at any time stop the half-pay of an officer in the army by signifying his pleasure that it shall be no longer paid.

(a) *Vide Lidderdale v. Duke of Montrose and Another*, 4 *T. Rep.* 248. and *Flarty v. Odium*, 3 *T. Rep.* 680.

It

It appeared that the Plaintiff still continued on the list of half-pay officers, but the Defendants proved that the Plaintiff being indebted to the agents of the regiment in a large sum of money, on account of money over-drawn by him, they entered a *caveat* to prevent his receiving half-pay ;  
 [\* 176 ] and in consequence of that \* *caveat* Sir George Yonge, the secretary at war, sent a letter to the pay-office signifying his *Majesty's* pleasure that the pay should not be continued to the Defendant longer than *Christmas* 1789.

*Erskine*, for the Plaintiff, said that the pay appeared to have been stopped before the *King's* pleasure was signified. The pay-office could not stop the payment on account of the debt due to the agent, though if the agent was indebted to the crown an extent in aid might have secured this money. He admitted that the crown had the absolute controul of the army, but this sum of money having been appropriated by *Parliament* for the express purpose of paying the forces, the *King* could not, merely by signifying his pleasure, deprive the Plaintiff of the money so appropriated.

Lord KENYON said, he was clearly of opinion that the pay-office could not stop for the debt due to the agent. If the public had a demand on the Plaintiff that might be set off against the present action. But his *Majesty's* pleasure supersedes all enquiry, as he has the absolute direction and command of the army. It is true, *Parliament* has provided a sum of money, but that is to be distributed

distributed as the *King* chooses. The money is under his controul till such time as it is paid out. The *King* cannot take it for his own use, but he may prevent it from being paid to a person who is not entitled to receive it. The *caveat* of the agent was merely waste-paper till adopted by the *King*; when he adopted it, it became his own act; and it is for the honour of government to see that money due to an officer is applied to the payment of his debts.

The Plaintiff was nonsuited.

\* *Note.* Mr. *Bearcroft*, in opening the Defendant's case, said that the money was not stopped on account of a debt due to the agents, but for a debt due to the Crown for money remaining in the Plaintiff's hands as paymaster of the 84th regiment: but this was not proved. [\* 177]

# GOODE v. JONES.

Wednesday,  
February  
27th. At  
Guildhall.

*ASSUMPSIT* for money had and received.

The Plaintiff, a grazier in the country, had sent three oxen by *Cooke*, his drover, to *Smithfield* market, to be sold by a salesman there. *Holbeach*, the salesman, employed the Defendant as his book-

A book-keeper in *Smithfield* market receiving money for beasts sold there, is liable to pay such money

keeper, to the owner of the beasts, and cannot apply it in payment of a debt due to him from the salesman.



keeper, and he was also employed by several other salesman. On the evidence it appeared that it was the business of the book-keeper to receive the money from the purchaser, and keep an account of the beasts sold, distinguishing what each beast was sold for, and to whom it belonged. When that is done the salesman sends an order to the book-keeper, desiring him to pay the money to the drover.

In the present case, *Holbeach*, the salesman, being indebted to the Defendant, he refused to pay the money received for the Plaintiff's cattle to him, insisting that he had a right to retain the money received by him on that account, to satisfy the debt due to him from *Holbeach*. *Holbeach* became insolvent, and the Plaintiff brought the present action.

[ \* 178 ] *Erskine*, for the Defendant, contended that there was no privity between the Plaintiff and the Defendant. \* The Defendant kept his account with *Holbeach* only, and the Plaintiff could only call on him for the money. This is much like the case of a banker. If a sum of money is paid into his hands for the use of a factor, it will never be contended that the principal may maintain an action against him. He offered to call witnesses to prove that by the universal custom of the market the book-keeper was considered as the debtor of the salesman, and not of the grazier, with whom he had no connection.

Lord KENYON said, he never was clearer in any case

case than the present. By the common law of the land the Plaintiff is entitled to receive this money from the Defendant, and no custom whatever can deprive him of it. There is not the least similitude between the case of a banker and the present Defendant. No privity whatever exists between the banker of a factor, and the principal whom he never heard of, but this Defendant knew that he was receiving this money for the use of the Plaintiff: he entered his name in his book, and distinguished how much was due to him.

Verdict for the Plaintiff.

# CASES IN K. B.

AT THE SITTINGS

AT NISI PRIUS,

AFTER TRINITY (a) TERM, 33 GEORGE III. 1793.

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*Monday,  
June 24th.  
At West-  
minster.*

COLE and Another v. BLAKE.

If on a tender being made, the creditor insists on receiving a larger sum of money, he cannot afterwards object to the formality of the tender on account of the debtor having required a receipt.

THIS action was brought to recover a sum of £15. 2s. which the Plaintiffs claimed to be due to them for work and labour done as surveyors. The Defendant pleaded a tender of ten guineas.

It clearly appeared that the plaintiffs were not entitled to receive more than ten guineas, but the witness who proved the tender, on his cross examination said, that he believed he had asked for a receipt in full, and added that he should not have paid the money unless the Plaintiffs would have given such receipt. But he said further that the Plaintiffs insisted on payment of £15. 2s. for

(a) Every case which came before the Court at the *Sittings after Easter Term*, 33 Geo. 3. has been already reported by Mr. *Espinasse*.

this

this work, and did not pretend to have any other demand on the Defendant, or object to the formality of the tender on account of the receipt being demanded.

Lord KENYON was clearly of opinion that the tender was proved. His Lordship said that it had been determined, that a party tendering money could not in general demand a receipt for the money. There had been one case indeed in the *Exchequer*, in which Sir *Watkin Williams* was a party, where it was determined that the King's Receiver was obliged to give a receipt (a), but that was an exception to the general rule. In this case, however, the dispute between the Plaintiffs and the witness was not whether a receipt should be given or not, but whether the sum tendered was sufficient; and, as it clearly appeared on the Plaintiffs' own evidence that the sum tendered was sufficient to satisfy the whole demand, he was of opinion the Defendant was entitled to a verdict on the plea of tender.

Verdict for the Defendant (b).

(a) *Vide Bunbury*, 348.

(b) *Vide Smith v. Black*, ante, [88.] and *Read v. Golding*, 2 *Maule* and S. 86.

LOCKYER v. JONES, K. B. *Guildhall*, Sittings after *Hilary Term*, 36 Geo. 3.

*Assumpsit* for money lent, to which the Defendant pleaded a tender of 10*l.*

The Plaintiff endeavoured to prove a debt of 40*l.* but was not able to prove more than 10*l.*; and the Defendant in support of his plea, proved, that in *July*, 1795, the Plaintiff and he  
having

having an altercation about the money due from him to the Plaintiff, he tendered a 10*l.* *Liverpool* Bank Bill of Exchange to the Plaintiff, which he refused to accept, insisting on being paid the whole of his debt.

The Plaintiff's counsel contended, that this was no legal tender, and attempted to distinguish this from the case of a Bank Note, which, in the ordinary transactions of mankind, was considered as cash.

But Lord *Kenyon* said, that though he was not inclined to give a greater credit to paper of this kind than it already possessed, yet he was of opinion, that the tender in the present case was a good one; that even a Bank Note was no tender if objected to by the creditor; but the Plaintiff in this case was precluded from now objecting to the legality of the tender by his conduct at the time it was made; he did not then object to it on account of the form in which it was made, but because it was not sufficient to cover his demand. Had he then objected to it on account of its informality, the Defendant might have taken the money from his pocket and tendered that.

Verdict for the Defendant.

*Mingay* and *Peake* for Plaintiff.

*Erskine* for Defendant.

This point arose again in the case of *Mills* against *Safford*, *Exch. East, T. 48 Geo. 3.* when the Court held, that a tender of a *Bristol* Bank Bill was not a good tender, though no objection was made to it on that account. But in a subsequent case in the *King's Bench*, this latter case was again overruled, and the decision of Lord *Kenyon* in *Lockyer* and *Jones* established as law. In *Glascott v. Day*, 5 *Esp.* 48. and *Huzham v. Smith*, 2 *Campb.* 21. Lord *Ellenborough* held, that a tender, accompanied with a demand of a receipt in full, was bad.

## JACKSON v. ATTRILL.

*ASSUMPSIT* for the use and occupation of part of a house, and for goods sold and delivered.

The Plaintiff was a liquor merchant, and the Defendant took one side of a house belonging to him, the other side being occupied by one *Eaton*, who sold \* liquors on the account of the Plaintiff. The Defendant kept an eating-house, and the liquors consumed by the customers there, were had from *Eaton*, as they were wanted. Many of the items in the bill for liquors were under 20s. By

The statute of the 24 Geo. 2. against selling liquors in quantities under the value of 20s. does not extend to liquors sold for the purpose of being sold again.

By the statute 24 Geo. 2. c. 40. s. 12. it is enacted, [ \* 181 ]  
 “ that no person or persons whatsoever shall be  
 “ intitled unto or maintain any cause, action or  
 “ suit for, or recover either in law or equity any  
 “ sum or sums of money, debt or demands whatsoever for or on account of any spirituous  
 “ liquors, unless such debt shall have been, and  
 “ *bona fide*, contracted at one time to the amount  
 “ of 20s. or upwards: nor shall any particular  
 “ article or item in any account or demand for  
 “ distilled spirituous liquors be allowed or maintained, where the liquors delivered at one time  
 “ and mentioned in such article or item shall not  
 “ amount to the full value of 20s. at the least, and  
 “ that without fraud or covin.”

*Garrow*, for the Defendant, contended that the Plaintiff could not recover in the present action for such liquors as were sold in quantities of less

R

value

value than 20s. They were sold directly in the teeth of this act of parliament, which is positive and without any qualification or exception.

Lord KENYON thought this case did not fall within the mischiefs intended to be remedied by this act of parliament, the intent of which was to prohibit the sale of such small quantities to the consumer. This was done for the purpose of preventing the pernicious effects of dram drinking, which had been found extremely injurious to the lower orders of society. In the present case the  
 [\* 182 ] liquors were not sold to the \* Defendant for his own consumption, but for the use of the guests resorting to his house in the way of his trade, and therefore, in his Lordship's opinion, not within the act of parliament. His Lordship said that he would take a note of the objection, and the Defendant might move the Court if he thought proper.

Verdict for the Plaintiff (a).

(a) In *Dawson v. Remnant*, 6 Esp. 24. where, upon the statement of an account arising out of cross demands, credit was given for the amount of spirits sold in quantities under the value of 20s. Sir J. Mansfield, C. J. held the settlement of the accounts conclusive, and would not allow the items to be disputed. So in *Spencer v. Smith*, 3 Camp. 9. Lord Ellenborough held, that it was no defence to an action on a bill of exchange that it was accepted by the Defendant for the amount of small quantities of spirits, each beneath the value of 20s. sold him by the Plaintiff. But in *Scott v. Gillmore*, 3 Taunt. 226. the Court of C. P. held such fact to be a good defence, and that the bill was wholly void, although part of the consideration was money lent.

## GREEN v. HEWETT.

Tuesday,  
July 2d.  
At Westminster.

*ASSUMPSIT* for money had and received.

The action was brought for the purpose of trying the Plaintiff's right to the office of Usher and Cryer of the Court of *King's Bench*, which he claimed as the grantee of the crown. The Defendant admitted the Plaintiff's right, but claimed the office of Under Usher, as an independent and distinct office from that of the Chief Usher and Cryer.

The under Ushers and Cryers of the Court of *King's Bench* are distinct officers from the Chief Usher and Cryer, and not dependant on him. *Comme semble.*

*Bearcroft*, in his opening for the Plaintiff, said it was clearly competent to the principal to execute by deputy, and that it was also clear that if a principal appoints a deputy, the appointment falls on the death of the principal. That the person who appointed the Defendant being dead, his office was at an end, and the Plaintiff had a right to appoint any other deputy. It was convenient it should be so, for the principal would be answerable for the deputy civilly, even should he be guilty of extortion. He said that a \* Deputy Teller of the Exchequer had contended that his office was independent of that of his principal, but he was unsuccessful.

[ \* 183 ]

The Plaintiff then proved a *patent* dated 27 Car. 2. another in 3d of W. & M. and a third on the 29th of April, 25 Geo. 3. whereby " the reversion " of the office of Usher and Cryer of the Court " of *King's Bench*," after the death of *John Collier*,



was granted to *John Cranston*, and the next reversion, subject to the lives of the said *John Cranston* and *John Collier*, to *Milward Rowe*. *John Cranston* being in possession of the office, and *Milward Rowe* being intitled to the reversion, they by deed poll appointed the Defendant "one of the Deputy Ushers of the Court, to hold and exercise the office of a Deputy Usher of the said Court in all things which to that office only belong, so long as he should live, and to take all wages, fees and regards which belong to the office of a Deputy Usher, and have been anciently due and accustomed to be paid for the exercise of the said office," and the Defendant at the same time signed a paper, whereby after receiving the appointment he "acknowledged and agreed that such appointment was not understood to contain any warranty or assurance from the said *John Cranston* and *Milward Rowe*, or either of them, for his holding the said place or office longer than the said *John Cranston* and *Milward Rowe*, or the survivor of them, should happen to live, in case any future Cryer or Usher should be appointed by his Majesty or any of his successors who should have power to remove him from his said office."

[ \* 184 ]

\* The Plaintiff next proved a grant of the reversion to him on the 26th of *February*, 28 *Geo. 3.* which grant, like all the others, granted the reversion of the office to him, "to have, occupy and enjoy, and exercise the said office unto him the said *William Green*, by himself or his sufficient deputy or deputies, with all and singular wages, fees

“ fees and regards, anciently due and accustomed  
 “ upon the exercise of the said office.”

Lord KENYON asked what appeared from the inquisition taken in the year 1730, as to the fees claimed by these officers? When the *Custos Rotulorum* died, which made room for Sir *David Lindsey*, it occurred to Lord *Mansfield* that the office of Deputy failed, and he doubted whether Mr. *Filmer* was not out, but a learned gentleman at the bar stating that in that inquisition the office was treated as a distinct office from that of the principal, he was suffered to continue in his office.

The inquisition taken in the year 1730 as to the fees due to different officers is conclusive evidence.

In a late case on the petty bag fees that inquisition was considered as conclusive evidence by all the gentlemen of the bar, and so treated by me.

The Plaintiff proceeded in his evidence, and proved the death of *Milward Rowe* on February 7, 1793, upon whose death the Plaintiff appointed four deputies, who came into Court with gowns on for the purpose of asserting their right to, and doing the duties of the office. He also proved that the Defendant had received money for the justification of bail, and on the trials of causes.

*Erskine*, for the Defendant, said that he meant to contend that the offices of Chief Cryer and Under Cryer, were distinct and different offices, and that the \* latter were not deputies to the former, but entirely independent of him. That it was so considered in the year 1730, when the inquisition was taken, for the fees due to each were contained

[ \* 185 ]

contained in separate lists (*a*). By that inquisition it appeared, that all fees taken in Court belonged wholly to the Under-ushers and Cryers, and that the Chief Usher and Cryer was entitled only to 4*d.* for every judgment, and 4*d.* on every special or common bail, which amounted to £400 *per ann.*; and as no such fees had been taken by the Defendant, he contended the Plaintiff must be called.

LORD KENYON. I will not say how far it is prudent in the Plaintiff to bring his right to a sinecure place thus publicly into discussion. The old way of trying questions of this kind was by an assize, but that mode is now laid aside, and this more compendious form of action adopted in its stead. This is a good form of action to try the Plaintiff's title to the office, but it behoves the Plaintiff to shew that he is entitled to the fees which the Defendant has received. He must shew what the limits of his demand are. But what proof has been given in this case, that any fees belonging to the Usher of the Court of *King's Bench* have been received by the present Defendant? As far as the inquisition goes, his fees are described, and they contain nothing that will include the fees now claimed. In many cases, the office of the deputy depends on the office of his principal, and ceases with it, but not always. The whole argument in this case rests on assumption. It has been as-

(*a*) See the lists presented to the House of Commons, p. 27. No. 12, and p. 32.

sumed,

sumed, though not proved, that the Under Ushers are mere deputies of the Chief Usher. If the word Deputy is used \* in the patent instead of Under Usher, it will not affect the case if it appears from the nature of the office that he is an independent officer. Many officers have power to grant more stable offices than their own. The Chancellor appoints the Masters in Chancery and Cursitors; yet if the *King* was to exercise his right of displacing the present Lord Chancellor, that would not affect the Masters in Chancery or Cursitors appointed by him. The case of the Teller of the Exchequer does not apply; it was clearly proved in that case, that he was a mere servant. There is no ground for saying that this Defendant received one farthing belonging to the Plaintiff; even if the fees were improperly received by the Defendant, it does not follow that they belong to the Plaintiff; to support this action for them, he should shew expressly that he is entitled to them. I say nothing of the Act of Parliament, but it is well worth Mr. *Green's* while to consider whether these are not officers independent of him. The acknowledgement signed by the Defendant does not go in derogation of his life estate, if he has such an interest, it was only meant to avoid a warranty.

Nonsuit.

HAWKINS

*Wednesday,  
July 3d.  
At Guildhall.*

**HAWKINS and Others v. RUTT and Another.**

A person remitting money by the post should deliver the letter at the general post-office, or a receiving house appointed by that office, and not to a bell-man in the street.

*ASSUMPSIT* for goods sold and delivered.

The Plaintiffs had desired the Defendants to remit them the debt, for which this action was brought, \* by the post; and the Defendants had accordingly inclosed bills of exchange of sufficient value to satisfy it, in a letter. This letter was delivered to the Bell-man in the Street, but never came to the hands of the Plaintiffs, nor could they trace any of the bills.

[ \* 187 ]

The Defendants' counsel contended that this was a good payment. The bills they said were remitted in the mode pointed out by the Plaintiffs themselves and at their risk.

LORD KENYON. The Defendants have not in this case used due caution. They ought to have delivered the letter at the general Post-office in *Lombard-street*, or to one of the houses authorised by that office to receive letters with money, and not to a Bell-man in the Street. Delivering letters with money, or bills in them, to a man of that description, is a temptation to him to be dishonest. Had the Defendants delivered the letter at a proper office, I should have thought that this was a very good remittance, but I do not think the Plaintiffs ought to be charged with money remitted as this was.

Verdict for the Plaintiffs.

STEVENS

## STEVENS and Others v. THACKER.

THIS was an action by the indorsee of a bill of exchange against the acceptor.

\* When the bill was produced to the Defendant for payment, he said that the acceptance was a forgery, and offered to make an affidavit that he had never accepted the bill. The Plaintiffs at first agreed not to sue the Defendant on the bill if he would make the affidavit offered by him; but being afterwards convinced that the Defendant had accepted the bill, they refused to receive the affidavit, and brought this action. The affidavit had been drawn and ingrossed, but not sworn.

*Erskine*, for the Defendant, contended, that the Plaintiffs having agreed to accept the Defendant's affidavit as evidence that he was not the acceptor of the bill, could not afterwards recede from the agreement; and mentioned a case wherein Lord *Mansfield* had decided, that the Defendant might discharge himself by such an affidavit.

Lord KENYON. Had the Defendant sworn the affidavit, I should have held that he had discharged himself from the present action, though such affidavit had been false, for the Plaintiffs, who had agreed to accept that affidavit as evidence of the fact, should not, after having induced the Defendant to commit the crime of perjury, maintain an action on the bill. But as in the present case, the Defendant had not sworn the affidavit,

If the holder of a bill of exchange agree not to sue the acceptor upon his making affidavit that the acceptance is a forgery, and such affidavit be accordingly made and sworn, he cannot afterwards bring an action on the bill, though the affidavit be false. *Aliter* if the affidavit be not sworn.

[ \* 188 ]

vit, he still remains liable to the Plaintiffs' action unless he can prove the acceptance a forgery.

The Defendant calling no witnesses, the Plaintiffs had a verdict (a).

(a) *Vide Bretton v. Prettiman*, Sir T. Raym. 153. where the Defendant promised to pay a debt in consideration that the Plaintiff would make an affidavit before a Master in Chancery, and it was held a binding promise, although the Master had no authority to administer the oath.

See also 3d Lev. 241. where it was determined that the parties who substituted a particular form of trial should be bound by the decision.

[ \* 189 ]

Friday,  
July 5th.  
At Guildhall.

\* DICK v. LUMSDEN.



If A. has an equitable title to goods on board a ship, and B. knowing of such title gets an indorsement of the bill of lading, he cannot recover such goods in an action of trover, but the captain will be justified in delivering the goods to A.

TROVER for a quantity of beef and pork, which had been delivered to the Defendant at *Newry* in *Ireland*, to be conveyed in a ship, of which he was master, to *London*.

The provisions in question were sent by *Thompson & Co.* from *Newry*, to *Eustace* and *Holland*, their factors in *London*, for the purpose of being sold; and on the 10th of *January*, 1793, *Thompson & Co.* wrote to *Eustace* and *Holland* to make an insurance, and said, that they would send the bill of lading. They accordingly sent the bill of lading on the 14th of that month, *not regularly indorsed*, but with the name of *Eustace* and *Holland* written on the back. The insurance was made on the 15th, and *Eustace* and *Holland* then wrote to  
*Thompson*

*Thompson & Co.* for an indorsement of the bill of lading. By a letter dated the 2d of *February*, *Thompson & Co.* answered, that *if the bill of lading was not indorsed it was a mistake, and that they would send an indorsement*; upon which *Eustace* and *Holland* sold the provisions to *Boehm* and *Taylor*.

*Thompson & Co.* had drawn bills on *Eustace* and *Holland*, and they not being able to pay them when they became due, the Plaintiff paid them for the honour of *Thompson & Co.* the drawers, of whom he was in other respects a creditor; and *having knowledge of all the above-mentioned transactions*, he wrote to *Thompson & Co.* for an indorsement of the bill of lading, which they sent him. He then demanded the provisions of the \* Defendant, but *Boehm* and *Taylor* having indemnified him, he delivered the provisions to them.

[ \* 190 ]

*Erskine*, for the Plaintiff, contended that the Defendant was bound to deliver the goods to the indorsee of the bill of lading, and could not take upon himself to judge of the Plaintiff's title to them. He compared the case to one which he said had been determined by Mr. Justice *Gould* on the circuit; who held, that a carrier having a mill-stone directed to one man, could not take upon himself to deliver it to another person, who he thought had a better title. *Boehm* and *Taylor* had no legal title to these provisions, whatever right they might have in equity.

LORD KENYON. The Plaintiff knowing all the circumstances of this case, could not by any subsequent



sequent act of his own, take the goods in question out of the possession of *Boehm* and *Taylor*. Though between persons ignorant of the transactions, an indorsement is the only transfer, yet where parties know the whole circumstances, a letter of this kind is a sufficient transfer of the property. The bills that have been mentioned were not drawn precisely for these goods, but on the general account. Here the factor transferred the property, and having a competent authority so to do, it was not essentially necessary that he should have the possession of the goods or an indorsement of the bill of lading. This is much like the case of a register county, as to the purchase of real property. If a man doth not register his purchase deeds, and another person buys the estate *without* [ \* 191 ] *notice* of the previous purchase, it will \* not affect him; but if he knows of such purchase he shall not avail himself of the neglect to register (*a*).

The Plaintiff was nonsuited (*b*).

(*a*) *Vide Hine v. Dodd*, 2 *Atk.* 275. 4 *Burr.* 2050.

(*b*) *Vide Caldwell and Others v. Ball*, 1 *Term Rep.* 205. *Hibbert and Carter*, *ibid.* 745.

# CASES IN K. B.

AT THE SITTINGS

AT NISI PRIUS,

AFTER MICHAELMAS TERM, 34 GEO. III. 1793.

HEARN and Another v. TOMLIN.

*Wednesday,  
Dec. 4th. At  
Westminster.*

THIS was an action for the use and occupation of a wharf.

The Plaintiffs had agreed to sell the wharf to the Defendant, and stated that the lease had 13 years to run. Under this contract the Defendant entered into possession of the wharf; but it being afterwards discovered that the Plaintiffs had an interest in the premises for three years only, the Defendant refused to complete his purchase. The first witness proved, that so far from being a beneficial occupation to the Defendant, he had been put to great expence in removing timber to the wharf which was intended to continue there some years.

Lord KENYON. To maintain an action for use and

shorter term) be charged in an action for use and occupation.

Where a man agrees to purchase premises on an assurance that the person of whom he purchases has a long term in them, and on the faith of such assurance at a considerable expence enters into the possession of them, he shall not, on his refusing to complete his purchase (on account of the seller having a

and occupation, it must appear that the occupation has been beneficial to the Defendant. This occupation was injurious to the Defendant, who had he been told that the Plaintiffs had only a term of three years in the premises, would never have entered upon them, and the Plaintiffs shall not be permitted to make this the ground of an action.

His Lordship therefore directed a nonsuit (a).

(a) In *Kirtland v. Pounsett*, 2 Taunt. 145. the Court of Common Pleas seem to have been of opinion, that if a purchaser take possession of premises under a contract of sale, which fails to be completed on account of a defect in the vendor's title, the vendor could not, in any case, recover rent for the period of the purchaser's possession, upon an implied contract for use and occupation. They did not, however, directly decide the point, their judgment in the particular case proceeding in some degree on the fact of the Defendant having paid the whole purchase money at the time of the contract, the interest of which they considered as a sufficient compensation for the use which the Defendant had of the premises. In *Hall v. Vaughan*, Exch. Mich. 59 G. 3. both these cases were cited, and the Court declared their opinion to be, that the vendor might in cases where the contract went off without fault on his part, and the occupation had been beneficial to the vendee, recover a compensation for such occupation, in this form of action; observing, that title was not necessary to sustain it, that the Plaintiff only alleged an occupation by his permission, and that Lord Kenyon, in the principal case of *Hearn v. Tomlin*, proceeded solely on the ground that the occupation was not beneficial to the Defendant; and it is to be observed that in the case of *Kirtland v. Pounsett*, Mansfield, C. J. seems at first to have inclined to the same opinion, observing, that "if a man had contracted for the purchase of an estate of the annual value of many thousand pounds, and had, through the imprudence of the vendor, been permitted to take possession, which he might possibly retain for many years pending a discussion of the validity of the title  
" in

"in a Court of Equity, it would be strange if the purchaser  
"could hold possession, and receive the profits during all that  
"time, without paying any consideration for it to the vendor."

*Case in Peakes Reports decided by  
a Kenyan in which he used a story of a  
to a boyon being called as a witness to support  
charges of a brother surveyor*

**DEDELL & STEWART.**

**ASSUMPSIT** for work and labour as a surveyor. The Plaintiff demanded £34, being £5 *per cent.* on all money charged by, and allowed to the different tradesmen. The Defendant had paid one half of the sum demanded into court, contending that 2½ *per cent.* was a sufficient compensation for the business the Plaintiff had done. He had done nothing more than measure the work, and settle the bills, not being at all employed in building the house.

A surveyor is to be paid according to his labour, and not according to the amount of the bills he looks over and settles (a).

*Garrow*, for the Plaintiff, offered to call witnesses to prove that the uniform practice of surveyors was to charge £5 *per cent.* on all money allowed to the workmen; and instanced the case of surgeons and others, whose fees were settled by the

(a) Same rule applied to the per centage of 7½ *per cent.* charged by auctioneers, *Maltby v. Christie*, 1 *Esp.* 340.

evidence

evidence of professional men, as to the usual charge on such occasions.

Lord KENYON. The Plaintiff is entitled to a reasonable compensation for his labour, but he is not to estimate that by the money laid out by the Defendant in finishing his building.

[ \* 194 ] \* I am bound to give my opinion on the matter of law, the Jury will answer as to the fact. I am enabled to state from the record what is the true question between the parties. The Plaintiff states his demand to be "as much as he *reasonably* deserves to have for his work and labour." Does he *reasonably* deserve to have this exorbitant demand? As to the custom offered to be proved, the course of robbery on *Bagshot Heath* might as well be proved in a court of justice. It ought not, nor cannot be supported.

On his Lordship expressing himself thus strongly, *Garrow* consented to a nonsuit.

*Friday,*  
*Dec. 6th.*

### ASHLEY v. HARRISON.

The proprietor of a public amusement cannot maintain an action against a man for a libel on one of his performers, by reason whereof she was deterred from appearing on the stage.

THIS declaration stated, that the Plaintiff during the time of *Lent*, 1793, caused to be performed every *Wednesday* and *Friday* night, by divers singers

singers and musicians at a certain place of public amusement called *Covent Garden Theatre*, certain musical performances for the entertainment of the public for certain rewards paid to him for admission into the said place of public amusement by those persons who were desirous of hearing the said musical performances; by means whereof he derived great gains, &c. yet the Defendant knowing the premises, but contriving to lessen the profits, &c. and to terrify, deter, &c. a certain public singer called *Gertrude Elizabeth Mara*; who had been before that time \* retained by the Plaintiff to sing [\* 195 ] publicly for him at the said place, &c. from so singing; wrote and published a certain false and malicious paper writing of and concerning the said *G. E. Mara*, and of and concerning her conduct, as such public singer as aforesaid, containing therein, &c. The libel was then set out, and the declaration concluded, that by reason thereof the said *G. E. M.* could not sing without great danger of being assaulted, ill-treated, and abused, and was terrified, deterred, prevented, and hindered from so singing; and that the profits of the amusement were thereby rendered much less than they otherwise would have been.

On the opening of the cause, Lord *Kenyon* expressed his disapprobation of the action, but on *Erskine*, for the Plaintiff, suggesting, that the objection was on the record, his Lordship permitted the cause to proceed.

The declaration was proved, and Madame *Mara* said, that "she did not choose to expose herself to "contempt again, and therefore refused to sing."

When the Defendant's counsel were proceeding to their defence, they were stopped by Lord Kenyon, who said: This action is unprecedented, and I think cannot be supported on principle. The injury is much too remote to be the foundation of an action. If this action is to be maintained, I know not to what extent the rule may be carried. For aught I can see to the contrary, it may equally be supported against every man who circulates the glass too freely, and intoxicates an actor, by which he is rendered incapable of performing his part on the stage. If any injury has happened, it was occasioned entirely by the *vain fears* or *caprice* of the actress. *Madame Mara* says, she did not choose to expose herself to contempt again. The action then is to depend entirely on the nerves of the actress; if she chooses to appear on the stage again, no action can be maintained; if she does not, her refusal is to be followed with an action. In actions for defamation whereby a woman loses her marriage, it is not sufficient to prove that she was a virtuous woman, and one who might reasonably hope to have settled well in life; but a marriage already agreed upon must be shewn to have been lost (a).

The Plaintiff was nonsuited (b).

(a) *Vide Cro. Eliz.* 787. *Cro. Jac.* 422. *Lut.* 1296. *Latch.* 218.

(b) *Vide Tarlton and Others v. M'Gawley*, post, 205. *Cro. Jac.* 567. *Roll. Rep.* 162. *S. C.* 1 *Roll. Abridg.* 107, 108. 1 *Bac. Abr.* 53. In *Taylor v. Neri*, 1 *Exp.* 386. where a person engaged by the manager of a theatre as a public singer had been beaten, and thereby prevented from performing, *Eyre*, C. J., held, that the manager could not maintain an action for the remote injury which he sustained in consequence.

DOE

DOE dem. WILLIAMS and Another v.  
PASQUALI.Saturday,  
Dec. 7th.

THE Defendant came into possession of the premises for which this ejectment was brought, as tenant to *Daniel Morgan*, who devised the same to the lessors of the Plaintiff upon certain trusts mentioned in his will. The will of *Morgan* had been contested in the Ecclesiastical Court, and it was proved that the Defendant had frequently said he was ready to pay his rent to any person who was entitled to receive it; but doubting whether the will was duly made, he had refused to pay it to the lessors of the Plaintiff. He had paid part of this rent to a man of the name of *Parke*, who had collected rents for *Morgan* in his lifetime.

\* The Plaintiffs' counsel contended that this refusal of the Defendant was such a disavowal of the lessors of the Plaintiffs' title, as entitled them to consider the Defendant as a trespasser, and eject him without any notice to quit.

[\* 197 ]

LORD KENYON said, this was not such a case as rendered a notice unnecessary. It had been held that if a tenant put his landlord at defiance, he might consider him either as his tenant or a trespasser, and in the latter case need not give him a notice to quit before he brought his ejectment: but that was not the case here, for the Defendant professed himself ready to pay to any person who was entitled to receive; nay, it is proved that he



actually paid a considerable part of his rent to *Parke*, who was the collector of *Morgan* in his lifetime, and the only person he could trust.

The Plaintiff was nonsuited (a).

(a) *Vide Bull. Ni. Pri. 96.*

Monday,  
Dec. 6th.  
At Guildhall.

PULLER and Others, Assignees, &c. of FORBES  
and GREGORY, Bankrupts, v. ROE and  
Others.

*A. B. C. and D. are in partnership together, and C. and D. also trade on their separate account. The partnership of A. & Co. becomes indebted to C. and D. and to satisfy such debt they indorse a note given to them. In an action by C. and D. as indorsees of that note, the debtor may set off any demand he has against A. & Co.*

*ASSUMPSIT* on a promissory note for £9800, dated March 8, 1793, payable to *Charles Caldwell, Esq. and Company*, or order, and by them indorsed to the bankrupts under the firm of "Messrs. *B. Burton, Forbes, and Gregory.*"

The Defendants pleaded the general issue, and gave notice of set-off.

*Bartholomew Burton*, and the bankrupt *Forbes*, carried on the business of general merchants in *London*, from the year 1762 to 1769, and on the 31st of *January*, 1769, the bankrupt *Gregory* was admitted a partner in the house. *Burton* died on the 27th of *April*, 1770, but the business was still carried on under the old firm of "*Burton, Forbes, and Gregory.*"

On the 21st of *May*, 1774, *Forbes* and *Gregory* became partners with *Charles Caldwell* and *Thomas Smith*, in a banking-house at *Liverpool*, under the firm

firm of *Charles Caldwell & Co.* and that partnership continued to the time of their respective bankruptcies, which happened in the month of *March*, 1793, viz. that of *Forbes* and *Gregory* on the 16th, and that of *Caldwell & Co.* on the 18th of that month.

The two houses of *Forbes* and *Gregory* and *Caldwell & Co.* were distinct and separate houses; *Caldwell* and *Smith* having no concern in the business carried on by *Forbes* and *Gregory* in *London*, though the latter were partners in, and equally concerned with *Caldwell* and *Smith* in the banking business carried on at *Liverpool*, under the firm of "*Charles Caldwell & Co.*"

*Caldwell* and *Smith* were also in partnership with the Defendants under the firm of *Roe & Co.*; which company kept a banking account with the house of *Caldwell & Co.* at *Liverpool*; and that house being in advance for the Defendants, they, on the 8th of *March*, 1793, made and signed the note on which the action was brought; and the house of *Caldwell & Co.* at *Liverpool*, being indebted to *Forbes* and *Gregory* to a large amount, indorsed the note to them.

\* This note was given for the balance then supposed to be due from the Defendants to *Caldwell & Co.* but it was afterwards discovered that a sum of £3859. 1s. with which the Defendants were debited for sundry bills supposed to have been drawn by *Major* (*Caldwell & Co.*'s. agent at *Truro*) was improperly charged; such bills never having been in fact drawn. [\* 199]

*Bower,*

*Bower*, for the Defendants, contended that *Forbes* and *Gregory* being partners in the house of *Caldwell & Co.* must take this note, charged with every incumbrance which it would be liable to in the hands of *Caldwell & Co.* and therefore that the Defendants had a right to deduct the above-mentioned sum of £3859. 1s. and to set-off not only the sum of £680. 8s. 10d. due to them from *Forbes* and *Gregory* as the *acceptors* of several bills drawn by *Caldwell & Co.* on them; but also the sum of £260. 18s. 3d. due to the Defendants from *Caldwell & Co.* on several bills drawn by *Caldwell & Co.* on *Forbes* and *Gregory*, which were *not accepted* by them. Some of these bills had been drawn by *Caldwell & Co.* for checks drawn upon them by the Defendants as their bankers; and the bills not being paid when they became due, in consequence of the failure of *Caldwell & Co.* and *Forbes* and *Gregory*, the Defendants were obliged to take them up, and had paid to the several holders of them the full value thereof. The others were either payable to the Defendants, or indorsed to them by the respective payees.

*Erskine*, for the Plaintiffs, contended that *Forbes* and *Gregory* being a distinct and separate house, and creditors of *Caldwell & Co.* to an amount much beyond that for which this note was given, were not liable to pay the before-mentioned sum of £3859. 1s. or the bills which they had *not accepted*.  
 [\* 200] For payment of those \* sums the Defendants must look to the estate of *Caldwell & Co.* who were their debtors.

Lord

LORD KENYON. This note was given to *Caldwell & Co.* as a banking-house, and constitutes an article in the accounts between the Defendants and them. They cannot *as between themselves* raise a distinct account, though they might indorse to a third person. The affairs of the company are in presumption of law known to all the partners, and all are equally liable. The Defendants send this bill to *Caldwell & Co.* to cancel part of the debt due to them: Can they, by an act between themselves, divert this money to another purpose, and leave the whole of the Defendants' debt outstanding?

The Plaintiffs, therefore, had a verdict for the balance due to them, after deducting the several before-mentioned sums of money, and also the sum of £1024, which it was admitted that *Forbes* and *Gregory* had received of the Defendants previous to their bankruptcy. In the following term a motion was made for a new trial, but the Court refused to grant a rule to shew cause (a).

(a) *Vide Jacund v. French*, 12 East, 317. *Crosse v. Smith*, 1 Maule and S. 545. *Ex parte Hanson*, 12 Vez. 346. *Ex parte Stephen*, 11 Vez. 27. *Ex parte Towgood*, *ibid.* 517.

*Wednesday,  
December  
18th.*

**MATTHEWS, qui tam, v. GRIFFITHS and  
Others.**

If a country banker discounting a bill takes interest for the whole time it has to run, and instead of paying money for the bill gives notes payable in *London* at three days after sight, such country banker is guilty of usury.

**T**HIS was an action on the statute against usury.

The declaration contained many counts on different loans.

The Defendants being bankers at *Portsmouth*, and Mrs. *Stewart* the proprietor of a considerable saltwork near that place; on the 21st of *December*, 1792, *Thomas Knott*, the servant of Mrs. *Stewart*, drew a bill for £600, on *Sedley*, her agent in *London*. The bill was payable to the Defendants or order, thirty days after date, and immediately it was drawn, taken to the Defendants, who gave their note for £600, payable three days after sight at *Fry and Robinson's*, in *London*. For this the Defendants received a discount of 5 *per cent.* calculating on the thirty days the bill had to run, but making no deduction on account of the three days the note had to run after sight, or of the three days grace which the bankers took thereon. *Knott*, on cross-examination, admitted that the money to be received on the draft was intended to be remitted to *London*, but swore that no money was offered to him by the Defendants, but that they gave him the note at three days sight, without asking any questions as to the mode in which he would be paid the money. All the other transactions between the parties were of the like nature, and another witness proved that these notes, payable

able at three days sight, were discounted when they arrived in *London*.

LORD KENYON said he was clearly of opinion that this was an usurious contract, whether the person discounting the bill chose to receive a note or money. If Mrs. *Stewart* chose to have a note payable in town, the Defendant should not have taken interest for the time that note had to run, but should compute his interest from the time it was payable; and on Mr. *Lubbock* the banker (who was on the Jury) saying that \* whenever he sent a bill to *Bristol*, the drawee sent a bill on *London* payable at thirty days after date, his Lordship said, that the law in this case was clear, and that no usage whatever could control it. [ \* 202 ]

On this the parties compromised the cause, and agreed to withdraw a juror; which done,

LORD KENYON said, Now the cause is over I must say one word for myself. I am most clearly of opinion that this is usury. Whether the party consented or not can make no difference. She was entitled to receive in money the amount of the bill after deducting the interest for the time it had to run. The Defendants could not give a note payable in six days without deducting from the discount the interest for those six days. There may be cases where a country banker may be entitled to receive more than £5 *per cent.*; such was the case of the *Sudbury Bank* (a), which came on in this place some years ago, and in which my

(a) *Winch qui tam v. Fenn*, 2 T. Rep. 52.

opinion concurred with that of the Jury. But all men, lawyers or not lawyers, must agree on this case, because here was a second discount paid on the notes. The case is so clear, that no two men in the profession can entertain different opinions on it (a).

(a) The opinion of Lord *Kenyon* in this case was much questioned at the time, but his Lordship always adhered to it; and expressly recognized the decision in *Maddocks v. Hammet*, 7 T. Rep. 185. A similar question arose in the case of *Hammet v. Yea*, 1 Bos. and Pul. 144. but it was there considered rather as a question of fact for the Jury, than as a question of law, and the Jury having found a verdict for the Plaintiff, the Court refused a new trial. In that case the Plaintiff being a banker in the country, discounted bills at four months for A. and took the whole interest for the time they had to run. A. on being asked how he would have the money, directed part to be carried to his account, part to be paid in cash, and part by bills on *London*, some at three, some at seven, and some at thirty days sight, and the money was paid accordingly. On the motion for a new trial, the Chief Justice (*Eyre*) said, I cannot agree to the doctrine that this transaction was necessarily to be taken to be a mere transaction of loan, and not of remittance. I think there was room to consider it as a mixed case of loan and remittance. Had the banker told down the money, or tendered bank notes, and had A. put them into his pocket, or swept them into his hat; and then said,—“But I want to send money to *London*, “will you take part of the money back and give me bills?” and the banker had accordingly done so and given these bills, I cannot see that there would have been any colour for calling it an usurious transaction. It was proved by the witness that the banker asked, “How will you have the money?” which short question includes, whether he would have it in cash or in cash notes, or in account, or whether he had any desire to have part of it remitted for him to *London*.—In the concluding part of his judgment his Lordship added, “The transaction is always before “a Jury. It is for them to say whether it is a device, or a fair  
“ agreement

“ agreement on good consideration ; whether if there be any  
 “ overplus after the five *per cent.* taken for discount, it is pro-  
 “ perly referrible to some lawful collateral consideration or not ;  
 “ if it be so referrible we should do the grossest injustice, if in-  
 “ stead of distributing the transaction into the parts of which it  
 “ is composed, we were by a strict literal construction upon  
 “ evidence to pronounce the contract to be what in substance  
 “ it is not, a contract for mere loan and forbearance.—On the  
 “ whole of the case, I see no ground sufficient to say that the  
 “ verdict is wrong. I thought the transaction so far doubtful at  
 “ the trial that I wished the Jury to consider whether the giving  
 “ these bills on *London* was not a mere cover for an usurious  
 “ contract. I said, that if the bills were drawn at a longer date  
 “ than is usual in the course of business, it ought to be con-  
 “ strued as device ; had they determined the other way I should  
 “ not have quarrelled with their verdict ; but I think there is no  
 “ sufficient reason for granting a new trial.” In *Parr v. Eliason*,  
 1 *East*, 90. an agreement on discounting a bill that the party  
 should take in part payment another bill which had time to run  
 as cash, although the full discount was taken, was held to be  
 usurious. See also *Hutchinson v. Piper*, 4 *Taunt.* 810.

## WILKES and Others v. JACKS.

Thursday,  
 December  
 19th.

*ASSUMPSIT* on a bill of exchange drawn by  
*Vaughan* on *Eustace* and *Holland*, and indorsed by  
 the Defendant.

The bill was dishonoured by *Eustace* and *Hol-  
 land*, but no notice of such dishonour given to the  
 \* Defendant. The Plaintiffs' counsel attempted  
 to cure this negligence by shewing that *Vaughan*  
 the

It is no ex-  
 cuse for not  
 giving notice  
 to the in-  
 dorsee of a  
 bill of ex-  
 change that  
 the acceptor  
 had no  
 effects.

[ \* 203 ]



the drawer had no effects in the hands of *Eustace* and *Holland*.

But Lord KENYON was of opinion that this circumstance would not avail the Plaintiffs. That rule only extended to actions brought against the drawer, the indorser was in all cases entitled to notice, for he had no concern with the accounts between the drawer and acceptor (a).

The Plaintiff then proved a letter of the Defendant's acknowledging the debt, and promising to pay it, on which evidence he recovered a verdict.

(a) *V. Brown v. Maffey*, 15 *East*, 215. acc. So though the indorser is acquainted with the insolvency of the drawer and acceptor, he is nevertheless entitled to due notice of dishonour. *Esdaile v. Sowerby*, 11 *East*, 114. and the cases cited in note (a) p. 116.

Friday,  
December  
20th.

### GRANT v. JACKSON, Bart. and Others.

An admission in an answer to a bill filed by other creditors against the Defendant may be read as evidence against him.

THIS action was brought on a bill of exchange for £100, drawn in the year 1768, by *Hesenclever* and Co. on the behalf of the *American Company*, of which company it was admitted the Defendants were surviving partners. *Hesenclever* was also a Defendant, but having pleaded his discharge under a commission

If several are sued and one plead his bankruptcy, upon which the Plaintiff enters a *nolle prosequi* as to him, he may still give evidence of the admissions of such Defendant made before he obtained a certificate.

a commission of bankruptcy, the Plaintiff had entered a *nolle prosequi* as to him.

Amongst other evidence the Plaintiff offered the answer of *Hesenclever* to a bill filed against him in the Court of Chancery by *other creditors*. At the time this answer was sworn, *Hesenclever* had become a bankrupt, but had not obtained his certificate.

*Garrow*, for the Defendants, objected to this evidence. In the first place he said that this being an \* answer to a bill at the suit of other persons [ \* 204 ] not parties to this record, was *res inter alios acta*, and therefore could not be evidence in the present cause.—Secondly, that at the time *Hesenclever* put in this answer, he had no interest to dispute the Plaintiff's debt, for he had become a bankrupt, and was now not even a party to this record, being discharged by the *nolle prosequi*. It was much like the case of three being jointly indicted for a felony; if the bill was thrown out by the grand jury, as to one, his confession would be no evidence against the others.

LORD KENYON. This answer is not admissible evidence for all purposes. It could not be received to prove the partnership, but when once a partnership is established, the admission of one may bind all. If *Hesenclever* had obtained his certificate and been discharged by it, at the time he put in this answer, I think there would have been a formidable objection to the evidence, but at that time he was equally liable with the others. I do not receive it as evidence of a judicial proceeding,

ceeding, but as a naked admission. This is not like the case put of a felony, there can be no partnership in a crime (*a*).

The Jury found for the Plaintiff, damages £245, including the principal money, 25 years interest, and £20 *per cent.* being the damages always allowed on the return of bills to *America*.

Costs paid to a Defendant in equity ought to be allowed to the Plaintiff in his costs at law. *Comme semble.*

*Note.* No bill had been filed for a discovery by the present Plaintiff, but many other persons had filed such bills, and *Erskine* having in his address to the Jury complained of the hardship of a Plaintiff in equity being obliged to pay the costs of a discovery, \* Lord *Kenyon* observed that he had once heard Lord *Mansfield* say he thought, in such a case, the Court of Law ought to allow the costs paid to the Defendant in equity as costs at law; that he was struck with the propriety of the observation, and thought it would be a good rule to be adopted.

[ \* 205 ]

(*a*) See *Petherick v. Turner*, cited in *Wood v. Braddick*, 1 Taunt. 104. *Thwaites v. Richardson*, ante, 15.

Saturday,  
December  
21st.

## TARLETON and Others v. M'GAWLEY.

THIS was a special action on the case. The declaration stated that the Plaintiffs were possessed and  
An action lies against the master of a vessel for purposely firing a cannon at negroes, and thereby preventing them from trading with the Plaintiff. And it is no answer to such action that the Plaintiff had not conformed to the law of the country in paying the duty due to the king for his licence to trade.

and owners of a certain ship called the *Tarleton*, which at the time of committing the grievance was lying at *Calabar* on the coast of *Africa*, under the command of ——— *Fairweather*. That the ship had been fitted out at *Liverpool* with goods proper for trading with the natives of that coast for slaves and other goods. That also before the committing the grievance *Fairweather* had sent a smaller vessel called the *Bannister* with a crew on board, under the command of one *Thomas Smith*, and loaded with goods proper for trading with the natives, to another part of the said coast called *Cameroon*, to trade with the natives there. That while the last-mentioned ship was lying off *Cameroon*, a canoe with some natives on board came to the same for the purpose of establishing a trade, and went back to the shore, of which Defendant had notice. And that he well knowing the premises, but *contriving and maliciously intending to hinder and deter the natives from trading with the said Thomas Smith*, for the benefit of the Plaintiffs, with force and \* arms, fired from a certain ship [ \* 206 ] called the *Othello*, of which he was master and commander, a certain cannon loaded with gunpowder and shot at the said canoe, and killed one of the natives on board the same. *Whereby the natives of the said coast were deterred and hindered from trading with the said T. Smith for the benefit, &c. and Plaintiffs lost their trade.*

*Erskine*, in his opening for the Plaintiffs, distinguished this case from that of *Ashley and Harrison* (a), where Lord *Kenyon* had held the injury

(a) *Ante*, p. 194.

to

to be too remote to be the foundation of an action ; that decision, he said, was founded on principles recognized by the law of *England* from the earliest antiquity. So long since as the days of *Bracton* it was held that to constitute a duress in law it must not be “ *suspicio cujuslibet vani & meticulosi hominis, sed talis qui possit cadere in virum constantem ; talis enim debet esse metus, qui in se continet vitæ periculum, aut corporis cruciatum (a).*”

But in this case the Plaintiff's loss was not occasioned by the vain fears of the negroes, or even the fear of a battery being committed on them, but a fear arising from the danger of life itself.

The Plaintiffs called *Thomas Smith*, who proved the facts stated in the declaration ; and further, that the Defendant had declared the natives owed him a debt, and that he would not suffer any ship to trade with them until that was paid ; in pursuance of which declaration he committed the act complained of by the Plaintiffs. On his cross examination he admitted that by the custom of that coast no *Europeans* can trade \* until a certain duty has been paid to the king of the country for his licence, and that no such duty had been paid, or licence obtained by the captain of the Plaintiffs' vessel.

[ \* 207 ]

*Law*, for the Defendant, contended that the Plaintiffs being engaged in a trade which by the law of that country was illicit, could not support an action for an interruption of such illicit commerce, and compared this case to an action brought

(a) *Brac. l. 2. c. 5.*

for interrupting a Plaintiff in his endeavours to smuggle goods into this country, or alarming the owner of a house which the Plaintiff was about to break into. He also objected that this act of the Defendant amounted to a felony, and therefore could not be made the ground of a civil action, but he did not lay much stress on this objection.

LORD KENYON. This action is brought by the Plaintiffs to recover a satisfaction for a civil injury which they have sustained. The injury complained of is, that by the improper conduct of the Defendant the natives were prevented from trading with the Plaintiffs. The whole of the case is stated on the record, and if the parties desire it, the opinion of the Court may hereafter be taken whether it will support an action. I am of opinion it will. This case has been likened to cases which it does not at all resemble. It has been said that a person engaged in a trade violating the law of the country cannot support an action against another for hindering him in that illegal traffick. That I entirely accede to, but it does not apply to this case. This is a foreign law; the act of trading is not itself immoral, and a *jus positivum* is \* not binding on [ \* 208 ] foreigners. The king of the country and not the Defendant should have executed that law. Had this been an accidental thing, no action could have been maintained, but it is proved that the Defendant had expressed an intention not to permit any to trade, until a debt due from the natives to himself was satisfied. If there was any court in that country to which he could have applied for

T

justice

justice he might have done so, but he had no right to take the law into his own hands.

The Plaintiffs had a verdict, and the parties agreed to refer the damages to arbitration.

*Note.* In the beginning of the cause the Plaintiffs' counsel proposed asking the witnesses whether some of the negroes did not assign their fear of the Defendant as a reason for not trading with the Plaintiffs, but Lord *Kenyon* said that no declaration of the negroes could be received in evidence (a).

(a) *Vide Carrington v. Taylor*, 11 *East*, 571.

# C A S E S I N K. B.

AT THE SITTINGS

AT NISI PRIUS,

AFTER HILARY TERM, 34 GEORGE III. 1794.

SNELL v. PHILLIPS one, &c.

Friday,  
February  
14th. At  
Guildhall.

*ASSUMPSIT* on a promissory note of hand for £10. The Defendant pleaded the general issue and the statute of limitations.

The bill was filed as of *Trinity* Term last, and a witness was called by the Plaintiff, who proved a promise of payment in *July* or *August*, 1787. He could not speak positively in which of those months the promise was made, but was sure it was not later than *August*.

The Defendant offered evidence, that though entitled of *Trinity* Term, the bill was not in fact filed till *October*.

*Shepherd*, for the Plaintiff, objected to this evidence, contending that though, for the purposes of justice, it was competent to a Plaintiff, to prove



when the suit was commenced, yet that the present Defendant ought not to be permitted to do it for the purpose of supporting his plea of the statute of limitations.

Lord KENYON said, the evidence should be received on the same principle, as it was permitted to a Plaintiff, to reply that a writ tested in term, was sued out in vacation according to the practice of the Court (a). The evidence was therefore received, and the Plaintiff nonsuited.

(a) *Vide Johnson and Another, Assignees, &c. v. Smith, Executrix*, 2 Burr. 960. *Morris v. Pugh et al.* 3 Burr. 1241. It is now usual when a bill against an attorney is filed in vacation to make a particular entry. 5 T. R. 325.

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#### KNIBBS v. HALL One, &c.

It is no objection to the set-off of a debt, that the Defendant had commenced an action for the recovery of that debt, before the Plaintiff's cause of action accrued.

THIS was an action brought for the use and occupation of certain rooms; the Defendant pleaded the general issue, and gave notice of set-off for business done as an attorney, &c.

The Defendant had brought a cross action for this bill of costs, which was made the subject of a set-off. That debt had accrued, and the action on it was commenced, *before* the debt for which the present action was brought, had become due.

*Garrow*, for the Plaintiff, objected that these were

were not such *mutual* debts at the time of the commencement of the Plaintiff's action, as would entitle the Defendant to sue the Plaintiff, and also to set-off his debt. To enable him to do so, he contended that the debt for which the present action was brought should have been due at the time the Defendant commenced his action against the Plaintiff.

Lord KENYON overruled this objection; being clearly of opinion that these were *mutual* debts within the meaning of the statute (a).

This and the other cause were referred to arbitration.

(a) *Vide Baskerville v. Brown*, 2 Burr. 1229. 1 Black. 293. S. C. and *Evans v. Prosser*, 3 T. Rep. 186.

# MINETT and Others v. ANDERSON.

Monday,  
March 3d.  
At Guildhall.

*ASSUMPSIT* on a policy of insurance on the ship *Hercules*, from *Bilboa* to *Rouen*, and until she had been 24 hours moored *in safety* there.

The ship arrived at *Rouen* on the 1st of *February*, 1793, an embargo having been previously laid on all *English* vessels in that port. The captain went on shore the day he arrived, and an em-

bargo

If a policy be on a ship bound to a foreign port until she is 24 hours moored *in safety* there; and previous to such ship's arrival at her destined port

an embargo is laid on all *English* vessels in that port, and she on entering it is also detained, and her crew made prisoners of war, the assured is entitled to recover.

bargo was the next day laid on his ship. He was afterwards permitted to land his cargo, and delivered it to the consignees, who were merchants at *Rouen*, but the ship was detained as a prize, and the captain and crew allowed subsistence as *prisoners of war*, from the time of their arrival.

The Defendant offered evidence to prove that no guard was put on board the ship, till some days after her arrival.

Lord KENYON. That would not alter the case. She was as much within the power of the enemy as if a guard had been put on board the moment she arrived. She could not be said to be 24 hours, or a minute moored in *safety*, as far as relates to these Plaintiffs; for immediately she entered the port she was to all intents and purposes captured by the *French*.

Verdict for the Plaintiffs.

*Tuesday,  
March 4th.*

### GREEN and Others v. ELMSLIE.

If a ship be driven by stress of weather on an enemy's coast and there captured, it is a loss by capture and not by the perils of the seas.

THIS action was on a policy of insurance on the ship *Fly* from *Exeter* to *London*. The insurance was against capture only.

The ship while on her voyage was driven by a hard gale of wind on the coast of *France*, and was there captured by the enemy; she did not receive any damage from the wind.

*Erskine*

*Erskine* contended that this was a loss by the perils of the seas, and not by capture, and that therefore the Defendant was not liable on this policy.

But Lord KENYON said, the case was too clear to admit of argument; this was clearly a loss by capture, for had the ship been driven on any other coast but that of an enemy, she would have been in perfect safety.

Verdict for the Plaintiffs (a).

(a) *Vide Hodgson v. Malcolm*, 2 Bos. and P. N. R. 336. *Hodgson v. Whitmore*, 2 Stark. 157.

SMITH and Others, Assignees, &c. of LEWIS and POTTER v. JAMESON and Another.

Friday,  
March 7th.

*ASSUMPSIT* for money had and received.

*Robert Jameson*, one of the Defendants, was a joint assignee with the Plaintiffs, but was afterwards removed by order of the Lord Chancellor; and then re-assigned all his interest to the Plaintiffs.

Whilst he was an assignee he had received several sums of money which he had applied to the use of himself and the other Defendant (with whom he was in partnership,) with the approbation of the other Defendant, who knew that the money was part of the bankrupt's estate.

If an assignee of a bankrupt be removed and assign his interest to the other assignees, they may maintain an action for money had and received against him, to recover the money received by him as such assignee.

*Comme  
semble.*

The

The present action was brought under the direction of the Lord Chancellor, to determine whether the estates of both Defendants were liable (they having become bankrupts) and they were to be examined as witnesses, if necessary.

*Bearcroft* objected to the action in point of form. He said that one Defendant having been an assignee of the bankrupt's estate, was himself entitled to receive this money, that *he* could not have maintained an action against *himself*, and having assigned only such an interest as he himself had, could not in point of form be a Defendant.

LORD KENYON. When an assignee assigns his interest, he divests himself of all right, and becomes a debtor to those who remain assignees. *Choses in action* have always been considered as assignable in cases of bankruptcy (*a*).

The point on which the Chancellor entertained a doubt was reserved for the opinion of the court.

(*a*) *Vide* Mr. J. Buller's opinion, 5 Term Rep. 603. 2 Co. Bank. Law, 128, and *Wray, Assignee, &c. v. Barwis*, ante, 69. and *De Cosson v. Vaughan*, 10 East, 61. in which last case it was determined that the new assignee might sue upon a judgment recovered by the former assignee, and declare in general form as having been duly constituted and appointed assignee, &c.

# CASES IN K. B.

AT THE SITTINGS

AT NISI PRIUS,

AFTER TRINITY (a) TERM, 34 GEORGE III. 1794.

SEDDONS v. STRATFORD.

Friday,  
July 11th.  
At Guildhall.

*ASSUMPSIT* by the Plaintiff as indorsee of a promissory note against the Defendant, who was the payee and first indorser. Counts for money paid, &c.

The note in question was made by *Thomas Bell* and the consideration on which it was given, premiums for the insurance of tickets in the lottery. *Stratford*, the Defendant, indorsed it to *Clode*, who had notice of the illegal consideration on which it was founded: he offered it to *Cowley* in payment for some goods which he bought of him, but *Cowley* refusing to trust *Clode* with the goods unless he could get the name of some other person as an indorser of the note, *Clode* \* prevailed on the

A man who, at the request of the holder of a note, has put his name upon it and thereby been obliged to pay the contents to a *bond fide* holder, may recover the money paid from any person whose name is on the note, although he knew it was given on an illegal consideration.

(a) I have no note of any importance at the Sittings after Easter Term.

[ \* 216 ]

present

present Plaintiff to indorse the note, and then paid it to *Cowley*. When the note became due, the Plaintiff was obliged to pay it to *Cowley*. One of the Plaintiff's witnesses swore that the Plaintiff told him he knew the consideration on which the note was given.

*Shepherd*, for the Defendant, objected that on this evidence the Plaintiff could not recover, for, the note being given on an illegal consideration, an indorsee, to entitle himself to recover against the indorser, should shew that he had paid a valuable consideration for it.

LORD KENYON. It has been frequently held in the Court of Chancery, that a mere volunteer, who has been obliged to pay money in consequence of an obligation he has entered into, is intitled to recover that money from the person on whose behalf he has paid it. The Plaintiff was *obliged* to pay this money to *Cowley*, who came fairly and honestly by the note, and had a right to recover the value of it from any person who appeared to be a party to it. The Plaintiff derives his title from him, and the Defendant being clearly liable to pay the money to *Cowley*, it is no injury to him to be obliged to repay it to the Plaintiff who has paid it for him.

Verdict for the Plaintiff.

LEDGER

## LEDGER v. EWER.

*ASSUMPSIT* on a bill of exchange for £100, drawn by the Plaintiff on the Defendant, and accepted by him.

\* It appeared that this bill of exchange was accepted in consideration of the Defendant being permitted to enter into partnership with the Plaintiff as a hatter. The Defendant was an indiscreet young man, who had a considerable sum of money, and the Plaintiff having got possession of a shop, but *no business* and little money to support it, prevailed on the Defendant to enter into this engagement. The Defendant's friends disapproving the connection, it broke off, on which the Plaintiff brought the present action.

Lord KENYON left it to the Jury, to consider whether this was not a gross fraud on the part of the Plaintiff. If they should be of a contrary opinion, and think that the Plaintiff was entitled to recover any thing, they would then take into their consideration the damages which he had really sustained by the non-performance of the contract, and were not obliged to give the whole sum for which the bill was given in damages (a).

The Jury found for the Defendant.

(a) *Vide Barber v. Backhouse and Others, ante, 61.*

If a bill of exchange be given in consideration of the Defendant entering into partnership with the Plaintiff, and the treaty is afterwards broken off, the Plaintiff is entitled to recover a verdict on the bill to the amount of the damages he has sustained, and not to the full amount of the bill.

[ \* 217 ]



*Saturday,  
July 12th.  
At Westminster.*

REX v. COLE.

The informer against a person guilty of concealing naval stores, is a good witness to prove the offence, for the court is not obliged to inflict a pecuniary penalty.

[ \* 218 ]

THIS was an indictment for concealing naval stores.

*Erskine*, for the Defendant, objected to the competency of one of the witnesses for the Crown, he being the informer, and entitled to a moiety of the penalty of £200, inflicted by the statute of 17 G. 2. on persons guilty of this offence.

\* Lord KENYON. I have looked into the Act of Parliament, and think that no objection can be taken on that account, for the Court may order a corporal punishment and are not obliged to inflict any pecuniary penalty whatever (*a*), and *non constat*, that they will do so. I mention this once for all, that no such objections may in future be taken.

(*a*) *Vide Rex v. Bland*, 5 Term Rep. 370.

(*b*) *Vide Rex v. Blackman, Espinasse*, 95, and *Peake's Law Ev.* 152. [160.]

BOTHAM,

## BOTHAM, Assignee, &amp;c. v. SWINGLER.

Tuesday,  
July, 15th.  
At Westminster.

THIS was an action of *assumpsit* for goods sold and delivered by the bankrupt to the Defendant, and for money had and received by him to the use of the bankrupt.

The Defendant had been servant to *Palmer*, the bankrupt, and in that character had received various sums of money from his debtors.

A man of the name of *Cave* was called to prove the payment of a sum of money to the Defendant on account of the bankrupt.

On the *voir dire* he was asked whether he was not a creditor of the bankrupt, and on his answering in the affirmative, *Garrow*, the Defendant's counsel, objected to this evidence.

He was then asked by the Plaintiff's counsel (*Erskine*), whether he had not himself become a \* bankrupt, and his estate been assigned under the commission issued against him.

A man who by his own examination on the *voir dire*, is rendered an incompetent witness; may be asked any question to shew that his interest is at an end, though the fact by which his interest be destroyed is matter of record.  
1 *Esp.* 164.  
S. C.

[ \* 219 ]

*Garrow* objected to this, contending that the proceedings under the commission should be produced.

LORD KENYON. On the *voir dire* he may give any answer which shews the situation in which he stands: he is made an incompetent witness by his answer to the question put by the Defendant's counsel, and it is impossible for the Plaintiff to come

come prepared with the materials necessary to shew him to be a bankrupt (a):

He offered to release his allowance to his assignees, and the attorney's clerk went out of court to prepare a release; but the other witnesses not being able to prove the payment of any money to the Defendant, the Plaintiff gave up his cause and was nonsuited.

(a) *Butcher's Company v. Jones*, 1 Esp. 160. *Rex v. Inhbs. of Gisburn*, 15 East, 57. acc.

[ \* 220 ]

Thursday,  
July 17th. At  
Westminster.

REX v. The Inhabitants of the Parish of St.  
PANCRAS.

An indictment against a parish for not repairing one side of the road (the other side lying in another parish) ought to state that each parish was liable to repair *ad medium filum viæ*, and not merely that a certain part of the road in breadth 15

THIS indictment stated, that there was on, &c. and long before, a certain ancient King's highway leading from the city of *London* to the hamlet of *Highgate*, in the county of *Middlesex*, into and through the several parishes of *St. Mary Islington* and *St. Pancras* in the county aforesaid, for all the King's subjects, &c. That a certain part of the said way between Battle Bridge and the hamlet of *Highgate* aforesaid, in a certain lane called or known by the name of *Maiden Lane*, in length three miles and in breadth fifteen feet lying in \* the parish of *St. Pancras*, was ruinous and out of repair, and that

feet was out of repair. A record of conviction on an indictment against a parish for not repairing a road is *conclusive* evidence of the liability of that parish to repair.

that the inhabitants of that parish ought to repair, &c.

*Erskine*, in stating the prosecutors' case, said, that all the lands on the *East* side of the lane were in the parish of *Islington*, and those on the *West* side in the parish of *St. Pancras*. That the parishes parted in the middle of the lane, and of course that each parish was liable to repair one half of the road.

Lord KENYON on this opening expressed a strong opinion that the prosecutors could not succeed on this indictment. That it should have particularly pointed out what part of the road lay in one parish and what in the other: but on *Wood* (who was also counsel for the prosecutors) saying, that this was the common mode of drawing these indictments, his Lordship permitted the cause to proceed (a).

The prosecutors having closed their case, the Defendants produced a copy of a record of conviction in this Court, on an indictment against the inhabitants of the parish of *Islington*, for not repairing this road called *Maiden Lane*.

Lord KENYON. I am clearly of opinion that this indictment is very inaccurately drawn, it

(a) *Sed Vide Stephens v. Whitler*, 11 East, 51. where it was held that the Plaintiff having lands abutting on one side of a public highway called *Shepherd's Lane*, might declare generally for a trespass in his close called *Shepherd's Lane*, and the Defendant must plead soil and freehold in another in order to drive the Plaintiff to new assign the trespass complained of in the part of the lane which was his exclusive property.

should

should state that one half of the road lay in the parish of *Islington*, and the other in the parish of *St. Pancras*. But this record is *conclusive* evidence against the parish of *Islington*; for, by it, it is found that they are liable to repair the whole of the road called *Maiden Lane*. I admit that had there been an acquittal, the record could not have been evidence for the parish of *Islington*. The reason why it would not have been evidence for \* them, is because some other parties might have indicted them, and those parties could not be bound by this record. There are many cases where a record is evidence against a person, though it is not so for him.

[ \* 221 ]

If the parish of *Islington* can shew fraud (a), it will vitiate this or any other transaction; but unexplained, this is conclusive evidence. On such a case as this the indictment should have stated

(a) If the parish consist of several districts which have immemorially repaired the respective highways lying within them, and if the districts in which the road indicted is not situate can shew that they had no notice of the former indictment (the defence having been made and conducted entirely by the district within which the road lies), the Court will consider the indictment as being substantially against the district, and give the other districts leave to plead the prescription to a subsequent indictment for not repairing the highway in the parish, *R. v. Townsend*, 1 Dougl. 421. *R. v. Eardisland*, 2 Camp. 494. 2 Saund. 159. c. And per Lord Ellenborough, *R. v. Justices of Lancashire*, 12 East, 368. "When it was known that the roads "were repairable separately by the different districts of the "parish, it was a fraud in those who undertook to defend the "parish against the indictment not to have put in a special plea "to that purpose."

that

that each parish was liable to repair *ad filum medium viæ*.

The Defendants were acquitted without further evidence.

PICKARD *v.* BONNER, Esq.

Friday,  
July 18th.  
At Guildhall.

*ASSUMPSIT* for money had and received.

Mr. *Bonner*, the Defendant, having a considerable place in the Post-office, and having occasion to employ several persons as clerks to him, the Plaintiff applied to one *Morris*, who was the Chief Clerk in the Defendant's office, to procure him such a situation, and agreed to give him £100 as a consideration for procuring the place. It was agreed, that the Plaintiff should go into the Defendant's office, and continue there six months on trial, that he should have at the rate of £80 *per annum*, for that time, and afterwards a further salary if the service continued. Afterwards the contract broke off, and it being discovered that *Morris* had paid this money over to the Defendant, this action was brought to recover it back.

Q. whether a person paying money on an illegal consideration, can recover it back in an action for money had and received.

\* On his examination to-day, *Morris* swore that he did not receive this money on account of the Defendant, but entirely on his own account, and that he paid it to the Defendant in part of the debt

[ \* 222 ]

due from him to the Defendant, of course this action could not be supported.

But Lord KENYON said, that had it been proved that this was a transaction between the Plaintiff and the Defendant, the money could not, according to the doctrine which had been laid down by Lord *Mansfield*, be recovered back, for it being for the purchase of a place under government would be illegal, and therefore the parties being *in pari delicto*, the Plaintiff could not succeed in a court of justice (a). Lord *Holt* had been of opinion that such an action might be maintained (b), and his Lordship said, he was inclined to agree with that opinion, though he certainly spoke with great diffidence when giving an opinion contrary to that of Lord *Mansfield*, but he thought it would be much more for the benefit of the public, if a person who had paid his money under such a contract were permitted to recover it back (c).

The Plaintiff was nonsuited.

(a) *Sed Vide Walker and Chapman*, cited *Dougl.* 454. in which case the Plaintiff was permitted to recover back the money, because the contract remained executory. In *Norman v. Cole*, 3 *Esp.* 253. Lord *Eldon*, C. J. held, that money deposited by *A.* in the hands of *B.* for the purpose of being paid over to *C.* for his interest in soliciting a pardon for a person under sentence of death, could not be recovered back in an action by *A.* against *B.* It does not appear from the report whether the money had been paid over by *B.* to *C.*, or whether *C.* had used any endeavours to obtain the pardon.

(b) *Wilkinson v. Kitchen*, 1 *Lord Raym.* 89. overruled in *Smith v. Bickmore*, 4 *Taunt.* 476.

(c) *Vide Lacassade v. White*, 7 *T. Rep.* 535. *Hewson v. Hancock*, 8 *T. Rep.* 575. and *Vandyck v. Hewit*, 1 *East*, 96. The cases

cases on this subject are collected by Mr. Serj. *Frere* in his edition of *Douglas*, 471. note *F. 3.* and 697. *a.* note *F. 7.* The inference to be drawn from the various decisions that have taken place on this subject appears to be, that the general principle *in pari delicto potior est conditio possidentis*, is subject to two exceptions. 1st. That where the illegality exists in the contract itself, and that contract is not executed, there is a *locus penitentiæ*, the *delictum* is incomplete, and the contract may be rescinded by either party. 2d. That where the law that creates the illegality in the transaction was designed for the coercion of one party and the protection of the other, or where the one party is the principal offender, and the other only criminal from a constrained acquiescence in such illegal conduct, in these cases there is no parity of *delictum* at all between the parties; and the party so protected by the law, or so acting under compulsion, may at any time resort to the law for his remedy, though the illegal transaction be completed. *Douglas*, 697. *a.* note, *F. 7.*

\* BRISTOW and Others, Assignees, &c. v.  
EASTMAN.

[ \* 223 ]

THIS was an action for money had and received to the use of the bankrupts before they became bankrupts.

The Defendant had been apprentice to the bankrupts, who were merchants, and, during his apprenticeship, had been entrusted by them to make entries at the Custom-house, and pay other sums of money on their account. He had frequently charged larger sums of money than those

*Assumpsit for money had and received, lies against an infant to recover money embezzled by him. Comme semble. 1 Esp. cas. 172. S. C.*



he actually paid, and the present action was brought to recover back the overcharges.

The Defendant attempted to defend himself, on account of his being an infant at the time.

Lord KENYON said the question was new, and had not been decided; but he was of opinion that this action, though in *form* arising *ex contractu*, in fact arose *ex delicto*, and as he could not have defended himself by reason of his infancy if an action of *trover* had been brought for the money, so he ought not to be permitted to defend himself on that ground, in this action (a).

The Plaintiffs proved that the Defendant acknowledged the fraud, and promised payment after he came of age, so that the point was not determined; the Plaintiffs obtaining a verdict on this evidence.

(a) And on the other hand, where the cause of action is the breach of a contract, the Plaintiff cannot deprive the Defendant of the protection of his infancy by declaring in tort; thus, where an infant hired a mare of the Plaintiff to go a journey, in the course of which the mare was strained, and the Defendant to an action of tort pleaded his infancy in bar, such plea was on demurrer holden to be good. *Vide Jennings v. Rundall*, 8 T. Rep. 335.

\* RICH and Another *v.* TOPPING.

[ \* 224 ]

Saturday,  
July 19th.  
At Guildhall.

THIS was an action of *assumpsit* by the indorsees of a bill of exchange against the acceptor.

The Defendant proposed calling *T. Topping*, the drawer and indorser of the bill, to prove that he had given it to the Plaintiffs on an usurious consideration. The acceptor had released him.

*Erskine*, for the Plaintiffs, objected that he was not a competent witness, although released by the acceptor. He admitted he would be a good witness to prove it void, *as against the acceptor*, on account of the want of consideration, &c. being known to the Plaintiffs, but he could not be a witness to prove usury, which would entirely defeat the bill, and discharge himself as well as the acceptor. If an action for usury were brought, he could not be a witness.

The drawer of a bill of exchange given for an usurious consideration, is a good witness to prove the usury in an action against the acceptor upon being released by him. 1 *Esp.* 177. S. C.

LORD KENYON. I should have been of opinion there was ground sufficient to reject his testimony, if he had not been released by the acceptor, because he would have been liable to him; but after a release the acceptor could not call upon him. I will not anticipate whether he would be a witness in an action for usury. But the judgment in this cause could not be evidence either for or against him, in another action. It would not go one step towards proving usury.

The Defendant, by the evidence of *Thomas Topping*

*Topping* and other witnesses, made a strong case, and Lord *Kenyon*'s direction was in his favour, but the Jury found for the Plaintiffs (*a*).

(*a*) It should seem that according to the rules now laid down, the drawer would have been a good witness in this case without any release, as standing indifferent between the parties. If accepted for his accommodation by the Defendant, he would not be liable to him unless the Plaintiff recovered. In respect of his liability to him, therefore, he was interested to defeat the action, but the moment he had succeeded in doing so, he himself became liable to an action as an indorser. The verdict in the present case would not avail him in that action, nor could his own evidence be used on his behalf, so that he would not be benefited by the verdict. And accordingly in *Brard v. Ackerman*, 5 *Esp.* 119. in an action against the acceptor the drawer was called to prove usury in discounting the bill, and it does not appear from the report that he was released. But in *Jones v. Brooke*, 4 *Taunt.* which was an action against the acceptor of a bill drawn for the accommodation of the drawer, the Court of C. P. held, that the drawer was not a competent witness without a release to prove that the holder came to the bill on a usurious consideration, because he did not stand indifferently liable to the holder and the acceptor, for the holder could recover against him only the contents of the bill, whereas the acceptor was entitled to recover against him both the amount of the bill, and also all damages he might have sustained, including the costs of the action against himself. This latter case, therefore, though it agrees with *Goodacre* and *Bream*, *ante*, 174. must be considered as at variance with *Ilderton* and *Atkinson*, 7 *T. R.* 481. and *Birt v. Kershaw*, 2 *East*, 461. cited *ante*, 175. note (*a*). See also *Phetheon v. Whitmore*, *ante*, 40. and *Humphrey v. Hoxon*, *ante*, 52. In *Clepsam v. O'Brien*, 1 *Esp.* 10. Lord *Kenyon* held, that letters of an indorser could not be read to impeach the title of the indorsee even where a note was indorsed when over due. But in *Kent v. Lowten*, 1 *Camp.* 177. which was an action by the indorsee of a note against the maker, Lord *Ellenborough*, C. J. held, that letters written to the latter by the payee, negotiating an usurious bargain, were admissible if shewn by the post-mark,

or

or otherwise, to have been contemporaneous with the making of the note. In a *qui tam* action for usury the borrower is a competent witness to prove the whole transaction, whether the principal be repaid or not. *Smith qui tam v. Prager*, 7 T. R. 60.

## SMITH and Others v. CLARKE.

Monday,  
July 21st.

THIS action was brought by the Plaintiffs as indorsees of a bill of exchange against the acceptor.

The bill was indorsed *in blank* by the *payee*, and, after several indorsements, it came to one *Jackson* (whose assignees had indemnified the present Defendant) under a *special* indorsement to him or order. *Jackson* sent it to *Muir* and *Atkinson*, and they discounted it with the Plaintiffs, but *Jackson* had not indorsed it. The Plaintiffs had struck out all the indorsements except the first.

When the payee of a bill of exchange has made an indorsement *in blank* thereon, no subsequent indorsee can restrain its negotiability by a *special* indorsement.

*Law*, for the Defendant, objected that this special indorsement had restrained the negotiability of the bill, and that the Plaintiffs could not recover without an indorsement by *Jackson*.

LORD KENYON. The fair holder of a bill may consider himself as the indorsee of the payee, and strike out all the other indorsements. This special indorsement being made after the payee had indorsed it, cannot affect the title of the present Plaintiffs.

*Note.* The Plaintiffs afterwards proved a letter from

*John Jackson v. Moore and Atkinson.* Issuing them a warrant this and other bills, but John Jackson thought the Plaintiffs' case sufficiently made out without his evidence.

Verdict for the Plaintiffs &c.

(6), *Per Petre v. East India Company*, 2 Burr. 1016. *Booth v. Rindell and Barker*, Doug. 311. *Booth v. Governor and Co. of the Bank of England*, 10 B.L.

Walsby,  
July 1841.

SCOTT and Another v. LARA.

To support an action for a false aver-  
ment as to the circum-  
stances of a  
third person,  
it must ap-  
pear that the  
Defendant  
intended to  
impose on  
the Plaintiff,  
and that the  
Plaintiff re-  
lied on his  
information.

The declaration stated that one David Valentine having applied to the Plaintiffs to purchase goods on credit, and the Plaintiffs being unacquainted with the credit of Valentine, and not knowing whether he was a person safely to be trusted, refused to sell him the goods until they should have made enquiry about his circumstances and credit. Whereupon Valentine referred the Plaintiffs to the Defendant Moses Lara, as a person well acquainted with his circumstances and credit. That thereupon the Defendant was requested by one Moses Lindo, the Plaintiffs' agent in that behalf, to inform them of the credit and circumstances of Valentine, when the Defendant wrongfully, &c. intending to defraud the Plaintiffs, and to induce them to sell the goods to the said Valentine, affirmed and asserted to said Moses Lindo, that Valentine was a safe man, in good circumstances, and might be safely

safely trusted. Whereas in truth and in fact the Defendant knew him to be the reverse, &c. That Plaintiffs thereupon sold the goods to *Valentine* on credit, whereby they lost the value thereof, &c.

*Moses Lindo* swore that he was desired by the Plaintiffs to enquire *Valentine's* character and circumstances of the *Laras* (there being two brothers in partnership); that he enquired of *Benjamin Lara*, the Defendant's brother, as to his credit, and whether he might be trusted; *B. Lara* answered in the affirmative, and said that he and his brother *Moses* were to enter into partnership with *Valentine* on the *first of June* then next, and that he had inspected his books. *Lindo* afterwards saw the Defendant, and told him the conversation which had passed between himself and *B. Lara*. The Defendant confirmed the character of *Valentine* given by his brother, and said he might be safely trusted. *Lindo* did not mention to the Defendant that he was desired by the Plaintiffs to apply to him, nor did he communicate to the Plaintiffs the conversation he had with *the Defendant*, but only mentioned the information he had received from *B. Lara*.

LORD KENYON. The Plaintiff cannot, on this evidence, recover against the present Defendant, though he might possibly against *Benjamin Lara*. There are two important links in the chain wanting to bring it home to the Defendant. *Lindo* did not communicate to him on whose account he applied, or to the Plaintiffs the information which the Defendant

fendant had given. Both these circumstances are necessary to sustain the action, for it must appear that the lie was told *for the purpose of imposing on the Plaintiffs*, and that they relying on that information were deceived.

The Plaintiffs were nonsuited (*a*).

(*a*) *Vide Pasley and Another v. Freeman*, 3 *T. Rep.* 51. which was the first action of this nature. In *Haycraft v. Creasy*, 2 *East*, 92. it was held that there must be an intention in the Defendant to deceive the Plaintiff, and that a mere assertion that the person enquired after was known to him to be in good circumstances would not support the action if the Defendant had been himself duped, and believed what he was asserting. In *Hutchinson v. Bell*, 1 *Taunt.* 558. the Court of *C. P.* held, that if *A.* make an enquiry of *B.* as to the circumstances of *C.* and stated that he proposes opening an account with *C.* as a general customer, and *B.* fraudulently misrepresents himself, in consequence of which *A.* sells *B.* goods from time to time, and is afterwards a loser by him, an action lies for the deceit, although *C.* pays for the first parcel of goods, in the purchase of which the reference is made. But in *De Graves v. Smith*, 2 *Camp.* 533. where the enquiries as to *C.* had been made generally, and *C.* had paid for the goods which it was in contemplation to sell when the representation was made, Lord *Ellenborough*, *C. J.* directed a nonsuit. And observing on the case of *Hutchinson v. Bell*, before cited, said, “ In the case in the *C. P.* the Plaintiff had “ stated to the Defendant that the third person was about to “ open an account with him as a general customer. On that “ ground the Defendant might be liable for any loss which arose “ to the Plaintiff from subsequent dealings within a reasonable “ time. But to say that in ordinary cases of this sort the person “ who gives a representation of the credit of a third person shall “ be liable for other parcels of goods afterwards furnished to him, “ would be to make the representation a controlling guarantee, “ and to repeal the statute of frauds. The observations of the “ learned

“learned judges in *Hutchinson v. Bell* must be confined to the case then in judgment before them. The Plaintiff, having been paid for two parcels of goods furnished after the representation, has failed to shew that he has sustained any loss by reason of the Defendant’s deceit.”

### KINGSTON v. PHELPS.

*ASSUMPSIT* on a policy of insurance.

The Plaintiff called a witness to prove that when the other underwriters referred the causes commenced against them, on this policy, to arbitration, the Defendant consented to be bound by the award, and that the arbitrators had decided in favour of the Plaintiff.

A submission to arbitration may be given in evidence on a count on the original promise.

\* *Law*, for the Defendant, objected to this evidence being received on this declaration, and contended, that to have the benefit of it, the Plaintiff should have had a count on the award.

[ \* 228 ]

Lord KENYON. This is a good evidence on this declaration, on the same principle as admissions are daily given in evidence (a).

The witness not proving any agreement on the part of the Plaintiff to be bound by the award, his

(a) *Vide Keen v. Batshore*, 1 *Esp.* 194. where a parol submission was received in evidence on the count for an account stated.

Lordship



Lordship said there was no mutuality, and therefore the Defendant's agreement was a mere *nudum pactum*, and not binding upon him (*a*).

The Plaintiff then called witnesses to prove the loss, and on their evidence obtained a verdict.

(*a*) So in an action on an award under a submission in writing, the Plaintiff must prove that all parties signed the submission, *Auham v. Chace*, 15 *East*, 209.

# CASES IN K. B.

AT THE SITTINGS

AT NISI PRIUS,

AFTER MICHAELMAS TERM, 35 GEO. III. 1794.

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FORD v. FOTHERGILL.

*Saturday,  
November  
29th. At  
Westminster.*

*ASSUMPSIT* for work and labour as a taylor.

The Defendant pleaded that at the time of making the promises he was an infant; and the Plaintiff replied that the clothes furnished were necessary for him.

The case appeared to be shortly this. The Defendant, being under age, came to the house of the Plaintiff, in company with a gentleman who was previously his customer, and ordered a coat, waistcoat, and two pair of breeches, which were to be sent to the *Grecian Coffee-house*, and were accordingly sent there.

The Defendant proved that at this time he was provided by his father with all things necessary for his support. He had been very extravagant, and

It is incumbent on a tradesman before he trusts an infant with what may appear necessaries, to enquire whether he is provided by his friends.

and his father had, in the course of the year 1793, when this debt was contracted, paid many other debts contracted with other *taylors* to a large amount.

[ \* 230 ]      \* *Mingay*, for the Plaintiff, contended, that it was not incumbent on the Plaintiff to traverse the town to enquire the Defendant's fortune and character. He came to him as a man of fortune and figure, introduced and recommended by a gentleman of fortune. If the Plaintiff thought them necessary for his state and degree, that would maintain the issue. In the way he appeared to the Plaintiff he could not know but that he had an estate of £500 *per annum*.

Lord KENYON (after lamenting the profligacy and extravagance of the youth of the present day, and the encouragement they received from persons trusting them with things for which they had no occasion) said, that from the earliest ages and in all countries, the law had protected men at the time of life when they had not wisdom to protect themselves. Nothing is clearer in the law than that an infant cannot contract a debt except for necessities. It is absolutely necessary that he should have the power of making that contract, otherwise he would starve. As to the Plaintiff not knowing his fortune, it is no excuse, it was incumbent on him to enquire into that, and to prove it to the Jury. Whether he was living with his father or not, the person who dealt with him was bound to enquire and know who he was. He was living at a coffee-house, itself no mark of a wary disposition :

disposition: the Plaintiff should have enquired there, and gone to his father and enquired of him whether he was in want of these clothes. Circumstanced as this case is, such an enquiry ought to have been made (a).

Notwithstanding this direction, the Jury found a verdict for the Plaintiff.

*Bearcroft* for the Defendant.

(a) *Vide Bainbridge v. Pickering*, 2 Blac. 1325. In *Maddox v. Miller*, 1 Maule and S. 378. which case was in its circumstances much like the above, Mr. Justice Bayley at N. P. nonsuited the Plaintiff, on the ground that he had not affirmatively proved that the clothes were necessities; but afterwards on motion for a new trial, the Court held, that whether so or not was a mixed question of law and fact, and ought to have been left to the Jury. The cause was afterwards tried a second time before Mr. Justice Dampier, when, under a strong direction from him that they were not necessary to the Defendant's degree, the Jury found a verdict for the Defendant. In another case of *Bliss v. Palmer*, Oxford Summer Assizes, 1817, cor. Abbott J. his Lordship took the same course, strongly enforcing the doctrine that the *onus* was upon the Plaintiff to shew the necessity of the articles furnished, and in that case also a verdict passed for the Defendant.

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REED v. PASSER and Others.

*Tuesday,  
December 2d.  
At Westminster.*

SEVERAL issues were directed by the Court of Chancery to be tried between these parties; but the first and only issue which was contested between

The Fleet  
books are no  
evidence.

tween them was, whether the Plaintiff was the heir at law of *Ann Botham* deceased.

The Plaintiff and *Ann Botham* were brother and sister, but it was contended by the Defendants, that their father and mother were never married, and therefore that they were both illegitimate.

*Garrow*, in opening the Plaintiff's case, said that he should prove by the friends and relations of this father and mother, that they were generally looked upon in the family as man and wife, and visited and treated as such. In addition to this, he said, he should produce one of the Fleet registers, which contained an entry in *March*, 1753, of a marriage being celebrated between them.

LORD KENYON. I must be consistent with myself; I did hold, on the last Home Circuit, that these books were no evidence whatever. Mr. J. *Heath*, I am told, afterwards ruled otherwise at *Shrewsbury* (a), but I cannot depart from my opinion. I have since looked into the books, and find my opinion strongly fortified by authorities. There is a case of *Morris* and *Miller* (b) in Sir *James Burrows'* Reports, which is in favour of the opinion I have given; there it was taken for granted that such books could not in any case be received as evidence. This is my opinion; it must guide *my* conduct. If others differ from me, it is very fit that my opinion should be considered.

(a) *Doe dem. Passingham v. Lloyd, Shrewsb. Summer Assizes, 1794.*

(b) 4 *Burr.* 2057.

When

When a witness was called to prove the general reputation that they were man and wife, *Mingay*, for the Defendants, asked him whether the parties did not say they were married in the Fleet; and upon the witness answering in the affirmative, objected to the testimony, contending that as the Fleet books were themselves no evidence of a marriage, any reputation of a marriage *there* was also inadmissible.

But the general reputation of the family that the parties were married in the Fleet, is good evidence.

LORD KENYON. The books cannot be received, because they come from tainted quarters, but the declaration of the parties that they were married there is good and strong evidence. A marriage in the Fleet at that time was good and legal. I think, though I do not speak meaning to be bound, that even an agreement between the parties *per verba de præsenti*, was *ipsum matrimonium* (a).

The Plaintiff having made a strong case by this kind of evidence, and no answer being given to it by the Defendants,

LORD KENYON said, that even since the marriage act it was not essential to the legality of the marriage \* that there should be a registration, but the act of parliament making it criminal in the clergyman not to do it, it is generally done. But still a marriage, since that act might be proved by reputation as well as one before (b).

The registration of a marriage is not absolutely necessary to make it valid.

[ \* 233 ]

The Jury found for the Plaintiff (c).

(a) *Vide Holt v. Ward Clarencieux*, 2 *Str.* 937. and 8 *Swinb.* 74. 2 *Salk.* 438. 6 *Mod.* 155. and *Rex v. Inhabitants of Bampton*, 10 *East*, 282.

(b) *Vide Rex v. Prestonnent Travasham*, *Bul. N. P.* 114.

(c) *Vide Standen v. Standen*, *ante*, 32. and *Lawrence and*

Others

*Others v. Dixon, ante*, 136. The Fleet books were also rejected by Lord C. J. *De Grey*, in *Howard v. Burtonwood, C. B.* Sittings at *Westminster*, after *Trin. T.* 1776, M. S. and in former cases by Lord *Hardwicke* and Lord C. J. *Lee*; and also by Mr. Justice *Le Blanc*, in *Cooke v. Lloyd, Salop Summer Assizes*, 1803; but in the case of *Haywood v. Firmin, C. B.* Sittings after *East. T.* 1766. M. S. Lord C. J. *Pratt* held, as Lord *Kenyon* did in the present, that the declarations of the mother that she had been married in the Fleet, were good evidence after her death. This case of *Reed v. Passer* afterwards came on in the Court of Chancery, when Lord Chancellor *Eldon* was also of opinion that the Fleet book was not evidence as a register, 1 *Cooper, Ch. Cases*, 152.

Thursday,  
December  
4th.

### JONES v. BROWN and Another.

To maintain an action for assaulting Plaintiff's infant son *per quod, &c.* proof of his living under his father's roof is sufficient evidence of service.

TRESPASS for an assault on *Joshua Brown*, the Plaintiff's son and servant, *per quod servitium amisit*.

The assault being proved, the Plaintiff's counsel proceeded to prove that *Joshua Brown* (who was a lad about 14 or 15 years of age), was employed about his father's business.

LORD KENYON said such evidence was unnecessary. If he lived in his father's family, and under his protection, that was sufficient to maintain the action.

Verdict for the Plaintiff (a).

(a) *Vide Fores v. Wilson, ante*, 55. accord.

DICKENSON

DICKENSON *v.* BROWN and Others.*Friday,  
Dec. 5th.*

TRESPASS for breaking and entering the Plaintiff's house, and imprisoning him. The Defendant justified the trespass, under a justice of peace's warrant to apprehend the Plaintiff as the putative father of a bastard child, in order to indemnify the parish, or enter into a recognizance for his appearance at the sessions.

A justice's warrant continues in force until fully executed. If the putative father of a bastard child agrees to indemnify the parish, they may demand any security they think proper.

To this plea the Plaintiff made a new assignment, stating that after the Plaintiff had been apprehended, and executed a bond to indemnify the parish, and at a different time from that stated in the plea, &c. the Defendants committed the trespasses complained of.

It appeared that on the 2d of *October*, 1793, the Plaintiff was apprehended under the warrant, and then went to the vestry, where he agreed to enter into a bond with two sureties to indemnify the parish. He and *one* of the sureties then executed the bond, but the other surety did not. On the 17th of *January*, 1794, the Plaintiff was again apprehended by the direction of the parish officers, in order to compel him to procure another surety. No fresh warrant had been obtained.

*Mingay & Espinasse*, for the Plaintiff, contended that the second arrest was illegal and could not be justified, that when the Plaintiff had been once apprehended, the warrant was executed, and that,

x 2

supposing



supposing the parish were not sufficiently indemnified, yet before he could be apprehended a second time, a new warrant should have been obtained for that purpose.

[ \* 235 ] Lord KENYON said, that the warrant of a magistrate was not returnable at any particular time, but continued in force until it was fully executed and obeyed, \* though it were seven years, provided the magistrate so long lived. That the warrant was not in this case fully executed, the parish officers had a right to have any security they required, however large, if the business was settled in that way. This was no hardship on the Plaintiff, for he was not obliged to enter into any such security, but might enter into a recognizance to appear at the sessions, and abide such order as they should make (a).

Verdict for the Defendants (b).

(a) *Vide Stat. 6 Geo. 2. c. 31, and 1 Burn's Just. 185.*

(b) A warrant to arrest a person that he may be bound to appear at the *next session of Oyer and Terminer*, may be executed at any time, *Mayhew v. Parker*, 8 T. R. 110.

## SNELL v. RICE.

*ASSUMPSIT* for work and labour.

The Defendant was a married woman, and the Plaintiff having obtained a regular judgment, the Court set it aside, and let the Defendant in to plead, she undertaking not to plead or take advantage of her coverture.

If a Defendant be let in to plead on the terms of not availing herself of her coverture, she cannot shew that the Plaintiff trusted her husband and not her.

*Mingay*, for the Defendant, offered to prove that the Plaintiff knew the Defendant's husband, and did this work on his credit. He contended, that this was evidence in this case, on the same principle that evidence was daily admitted, to prove that the work was done on the credit of a third person and not of the Defendant; and it was not to be considered as availing herself of her coverture.

But Lord KENYON thought this inadmissible evidence. The true construction of the rule is, that the Defendant should only dispute the *quantum* or justice of the debt: and not be permitted in *any way* to shew that her husband was liable, and so turn the Plaintiff round.

Verdict for the Plaintiff.

REX

[ \* 236 ]

*Saturday,  
December  
6th.*

\* REX v. The Earl of ABINGDON.

The privilege of replying in a criminal prosecution, when the Defendant does not call witnesses, is confined to the Attorney General. *Comme semble.*

THIS was an information against the Defendant for a libel on Mr. *Thomas Sermon* an Attorney.

The Defendant having spoken in his defence, but not called any witnesses, *Erskine*, for the prosecution, claimed the privilege of a reply, contending, that the counsel for the Crown had always this privilege; and *Garrow*, who was on the same side, said it had frequently been exercised.

*Gibbs*, as *amicus curiæ*, said, he had known several instances in which this privilege had been exercised on the circuit; and *Mingay*, who was also out of the cause, said he always understood that every counsel for the Crown had the privilege, though it was rarely claimed.

But Lord KENYON said, that though the Attorney General had undoubtedly this privilege, yet he never knew any other counsel for the Crown claim it, and he would not make the precedent in this cause.

The Defendant was convicted (*a*).

(*a*) *Rex v. Smith*, *Sittings after Michaelmas*, 37 Geo. 3. The Defendant was indicted for a libel, and called no witnesses, but Lord *Kenyon* permitted the prosecutor's counsel to reply, though this case was cited to him by Mr. *Gurney*, the Defendant's counsel, as he told me.

GREEN

## GREEN v. JACKSON.

*Monday,  
December  
8th. At  
Westminster.*

THIS was an action of *assumpsit* against the Defendant, for negligence and misconduct as an Attorney. The declaration stated, that *John Pott* being indebted to the Plaintiff, &c. she applied to the Defendant (he the said *Nathan* being then and there \* one of the Attornies of the Court of Session of the county of *Chester*), and then and there retained and employed him, &c.

An averment that the Defendant is an Attorney of a particular Court is not proved by the production of his bill of fees for business done in that Court.

The Plaintiff had, on the third instant, given the Defendant notice to produce his admission as an Attorney of the Court of *Chester*; and it not being produced, her counsel offered his bill for business done in that Court, as sufficient evidence to prove the averment. [ \* 237 ]

*Bower*, for the Defendant, objected that this was no evidence of the Defendant being an Attorney of the Court of Session.

*Garrow*, for the Plaintiff, answered, that having acted as an Attorney in that Court, he could not now say that he was not so: and *Wood*, who was on the same side, said a case had lately come before the Court, where in an action by an Attorney for words spoken of him in his profession, it was held that he was not obliged to prove his admission (a).

(a) *Vide Berryman v. Wise*, 4 Term Rep. 366.

LORD KENYON said, that by this declaration the Plaintiff had encumbered herself with too much proof. If she had stated him generally to have been employed as an Attorney, the evidence would have been sufficient. But his bill does not prove him to be an Attorney of that Court. As an Attorney of this or any other Court in *Westminster Hall*, he had a right to practise in that Court, using the name of an Attorney there.

His Lordship was about to direct a nonsuit, when a juror was withdrawn by the consent of the parties.

[ \* 238 ]

*Wednesday,  
December  
10th. At  
Guildhall.*

\* BOURDILLON v. DALTON and Others.

Assignees of  
a bankrupt  
are not liable  
to be  
charged for  
rent of pre-  
mises as-  
signed to  
them unless  
they take  
possession.

COVENANT against the Defendants as assignees for rent.

The lease had come by several mesne assignments to *Thomas Bell*, who had become a bankrupt, and his estate was assigned to the Defendants by the commissioners.

The Defendants had never taken possession of the premises.

LORD KENYON. They cannot be charged as assignees of the estate of *Bell*, unless they have taken possession of the premises. This resembles what is called the *damnosa hæreditas* in another law.

law (a). If the assignee takes possession of it, he must take it with all its charges ; but if he chooses to abandon it, it cannot be forced upon him.

The Plaintiff was nonsuited (b).

(a) *Vide Domat's Civil Law " of Heirs and Executors," B. 1. Tit. 1. s. 5. and note c.*

(b) This question was very fully discussed, and the authority of this case recognized, in *Copeland v. Stephens*, 1 B. and A. 593. That was an action of covenant for rent. The Defendant pleaded that before the rent was in arrear he became bankrupt, and that the lease of the premises was thereupon assigned by the commissioners to his assignees. Replication, that Defendant's assignees never accepted the lease. To this replication the Defendant demurred generally, and Plaintiff joined in demurrer. For the Defendant it was contended that in the case of an assignment under a commission of bankrupt, an actual renunciation of a term of years, which had been vested in the bankrupt, was necessary to prevent the estate from vesting in the assignees, and that a forbearance to accept the term, or to enter, or to take the issues of the land, being merely negative acts, were not equivalent to an actual renunciation. But the Court, upon the authority of *Bourdillon v. Dalton*, *Turner v. Richardson*, 7 East, 335. and *Wheeler v. Bramah*, 3 Camp. 340. were of opinion that the general assignment of a bankrupt's personal estate under his commission does not vest a term of years in the assignees, unless they do some act to manifest their assent to the assignment, as it regards the term and their acceptance of the estate. And therefore till some act of this sort was done by them the term still remains in the bankrupt, and he was liable to the payment of rent accruing due subsequent to the bankruptcy. Several cases have arisen as to what shall be deemed an acceptance of a term by assignees of a bankrupt lessee. In *Turner v. Richardson*, 7 East, 335. it was held, that the mere putting up the premises to auction for the purpose of ascertaining the value, without describing themselves as owners of the property, was not a sufficient taking possession to charge them as assignees. So where the assignees of a bankrupt having  
allowed

allowed his effects to remain upon the premises occupied by him nearly a twelvemonth after the bankruptcy, for the purpose of preventing a distress, paid the arrears of rent due, at the same time intimating to the landlord that they did not mean to take the lease unless it could be advantageously disposed of; the effects were soon after sold, and removed from the premises; the lease was at the same time put up to sale by order of the assignees, but there were no bidders for it; they omitted to return the key to the landlord for near four months; however, they were not asked for it, and they no otherwise made use of the premises: Held by Lord *Ellenborough*, C. J. that they were not under these circumstances liable to the landlord as assignees of the lease, *Wheeler v. Bramah*, 3 *Camp.* 340. But where the assignees, being chosen on the 8th of the month, allowed the bankrupt's cows to remain on the demised premises, which were pasture land, till the 10th, and ordered them to be milked there, Lord *Ellenborough*, C. J. ruled, that they thereby became tenants to the lessor, and the cows being removed on the 10th to avoid a distress for arrears of rent, that he had a right to follow and distrain them under 11 *Geo.* 2. c. 19. And where the assignees put up the premises to auction, and found a purchaser, and received a deposit; but the contract of sale afterwards went off without the assignees shewing any reason why they did not enforce the sale, Lord C. J. *Gibbs* held, that the contract of sale fixed them with the possession, and that it lay upon them to shew why they did not enforce the sale, *Hastings v. Wilson*, 1 *Holt*, N. P. 290. And where the assignee, on being applied to by the landlord to know whether he will take possession, answers, that if he cannot let it by *Lady Day* he will give it up, and keep possession accordingly, he thereby becomes assignee to lessor, and cannot quit till the end of term; for though he may refuse it at first, he cannot take it in part, and afterwards reject it when he finds it will not answer, *Broome v. Robinson*, cited 7 *East*, 339. When a tenant from year to year becomes bankrupt, and his assignees enter into possession, they are liable to pay rent for the time during which they occupied only, and not the rent due from the bankrupt before his bankruptcy, *Naish v. Tatlock*, 2 *H. B.* 319. and *vide Bast v. Wilson*, 8 *East*, 310. *Mills v. Auriol*, 1 *H. B.* 433. 4 *T. R.* 24. But by stat. 49 *Geo.*

*Geo. 3. c. 121. s. 19.* it is enacted, that if the assignees shall accept the lease or agreement for a lease, and benefit therefrom as part of the bankrupt's estate, the bankrupt shall not be liable to pay the rent accruing after such acceptance, nor be liable to be sued in respect of any subsequent non observance of the condition, covenants, &c. therein contained; provided that it shall be lawful in all such cases for the lessor or person agreeing to make such lease, his heirs, &c. if the assignees shall decline upon their being required so to do, to determine whether they will or will not accept such lease or agreement for a lease, to apply to the Lord Chancellor, Lord Keeper, or Lords Commissioners, &c. praying that they may either so accept the same, or deliver up the lease or agreement, &c. who may make an order accordingly.

BUTLER *v.* RHODES.

*Thursday,  
December  
11th.*

*ASSUMPSIT* for goods sold and delivered.

The Defendant had executed a deed, whereby he assigned all his property to trustees for the benefit \* of his creditors, and they agreed to accept a composition on their respective debts.

Several creditors had executed the deed, and before some of them had done so, the Plaintiff had also agreed to accept the composition, and the deed had been perused by his attorney, who had sent a letter to the Defendant's attorney, expressing his client's approbation of it. The Defendant's counsel contended, that under these circumstances the Plaintiff could not recover.

*Garrow* and *Park*, for the Plaintiff, objected that

If a creditor look over a deed of composition proposed by his debtor, and send a letter to the debtor's attorney expressing his approbation of it, and other creditors afterwards execute the deed, he cannot afterwards refuse to execute and maintain an action.

none [ \* 239 ]



none of the cases which had been decided went so far as to determine that in a case like the present, the Plaintiff could not withdraw himself from the composition. Here the Plaintiff had never in fact executed the deed, nor did it even appear that this letter of the attorney had been shewn to any other creditor to induce him to execute the deed.

Lord KENYON was of opinion, that the other creditors must have been induced to enter into this agreement on the faith of the Plaintiff also being a party to it. The transaction speaks for itself. Besides, the Defendant himself had been induced to commit an act of bankruptcy, by assigning all his effects.

The Plaintiff was nonsuited (a).

(a) *Vide Heathcote and Others v. Cruikshanks*, 2 Term Rep. 24. *Cockshott v. Bennett*, *ibid.* 763. *Jackson v. Duchaire*, 3 Term Rep. 551. *Jackson v. Lomas*, 4 Term Rep. 166.

[ \* 240 ]

\* REDDIE v. SCOOLT, Clerk.

A father who has permitted a married man to visit his daughter as a suitor, cannot maintain an action against him for seducing her.

TRESPASS for assaulting and debauching *Helen Reddie*, the Plaintiff's daughter and servant, *per quod servitium amisit*.

It appeared that the Defendant came frequently to the Plaintiff's house, and was received and entertained as a suitor of the daughter. During the time this intimacy continued, the father received an anonymous letter informing him that the Defendant

defendant was a *married man*, and a great libertine, and cautioning him against permitting him to be too familiarly acquainted with his daughter. The Plaintiff mentioned this letter to the Defendant, when he confessed he had a wife still living, but represented her as a woman of so abandoned a character, that he could not live with her. He told the Plaintiff that they had been parted six years, and at the end of the seventh, he should be able to obtain a divorce, and would then marry his daughter. He added, that his wife was worn out with disease, and could not long live. It also appeared, that the Plaintiff had been warned by another person to break off his acquaintance with the Defendant, notwithstanding which he permitted him to continue his visits and go *alone* with his daughter to the Theatre; the consequence of which was the accident which gave rise to the present action.

Lord KENYON said, that however reprehensible the conduct of the Defendant might be, and the unfortunate girl seduced, entitled to pity, still it must be recollected that the father was the Plaintiff on this record, and if *he* had misconducted himself, this action \* could not be maintained. [ \* 241 ] His Lordship thought that the Plaintiff had been guilty of gross misconduct in suffering the Defendant to continue his visits, after he knew that he was a *married man*, and had received a caution against admitting him into his family. He therefore found himself obliged to call the Plaintiff, though the conduct of the Defendant was so gross

gross that he would certainly represent him to the Bishop.

The Plaintiff was nonsuited (a).

(a) *Vide Hodges v. Windham, ante, 39.*

Saturday,  
December  
13th.

LEWIN and Others v. The EAST INDIA  
Company.

If a ship be chartered to the *East India* Company for the purpose of *trade or warfare*, and they order her on a voyage of *discovery*, against the consent of the owners, whereby the ship is lost, the owners may maintain an action on the case. *Aliter*, if the owners consent to the voyage.

THIS was a special action on the case. The declaration stated, that the Plaintiffs being owners of a ship called the *Vansittart*, by a charter-party of affreightment, dated 13th of *August*, 1788, let the same to the Defendants to freight for a certain voyage with her to be made *in trade and also in warfare*, as the said company, or any their governors, &c. should require or direct. That the Plaintiffs thereby covenanted that the ship should be used by the company *in trade or warfare*, if required by the company, *that the master should observe the orders of the company*, and that they should have power to displace him or any other officer or officers belonging to the ship. The declaration then stated, that the ship sailed on her voyage, and was engaged in the service of the Defendants; and that they, *without the knowledge or consent, and against the will* of the Plaintiffs,

[ \* 242 ]

\* employed the said ship in and upon a certain voyage

voyage and service, not being a voyage and service of trade or of warfare, and not being a voyage or service mentioned in, or intended to be warranted by the charter-party, or upon which the said ship ought to have been employed; to wit, in and upon a certain voyage and service of observation and discovery, in and to a certain dangerous sea, straight, or passage, situate to the *Eastward* of a certain island called the island of *Banca*, for the purpose of exploring the said sea, straight, or passage; and wrongfully, &c. without the knowledge, &c. kept and detained the said ship in the said voyage of observation and discovery for a great length of time; by reason whereof the ship, in the course of the said voyage, &c. was stranded, sunk, and wholly lost.

The Plaintiffs proved that the *East India Company* wishing to establish a passage by the Straights *Eastward* of the island of *Banca*, instead of the usual passage through the Straights of *Banca*, had given Captain *Wilson*, who had the command of the *Vansittart*, orders to take his passage to *China* that way, and to explore the coast as he past. That in obedience to those orders the Captain sailed on that voyage, and in the course of it the ship struck on a coral rock and was lost. On his cross examination, Captain *Wilson* said, that Mr. *Lewin*, the ship's husband, had retired from the cares of business, and that his son, who was also a Plaintiff in this cause, transacted his business. That he had received his orders from the Company before he left *England*, and had communicated

cated them to Mr. *Lewin*, the son, who did not object to the voyage.

[ \* 243 ] \* Lord KENYON. The Captain was bound to obey the orders given him by the Company. These orders were certainly not warranted by the terms of the charter-party, and therefore had the case rested on the orders, I should have thought that the Plaintiffs had a right to maintain the present action. But the consent of Mr. *Lewin*, junior, who was agent of the ship's husband, entirely alters the case, for the ship proceeding from *England* without any objection from him, it must be taken that she sailed with his consent, and therefore proceeded at the risk of the owners. His Lordship added, that had there been any collusion between the Company and one part owner, that would not have bound the others; but nothing of that kind appeared to have been intended in the present case.

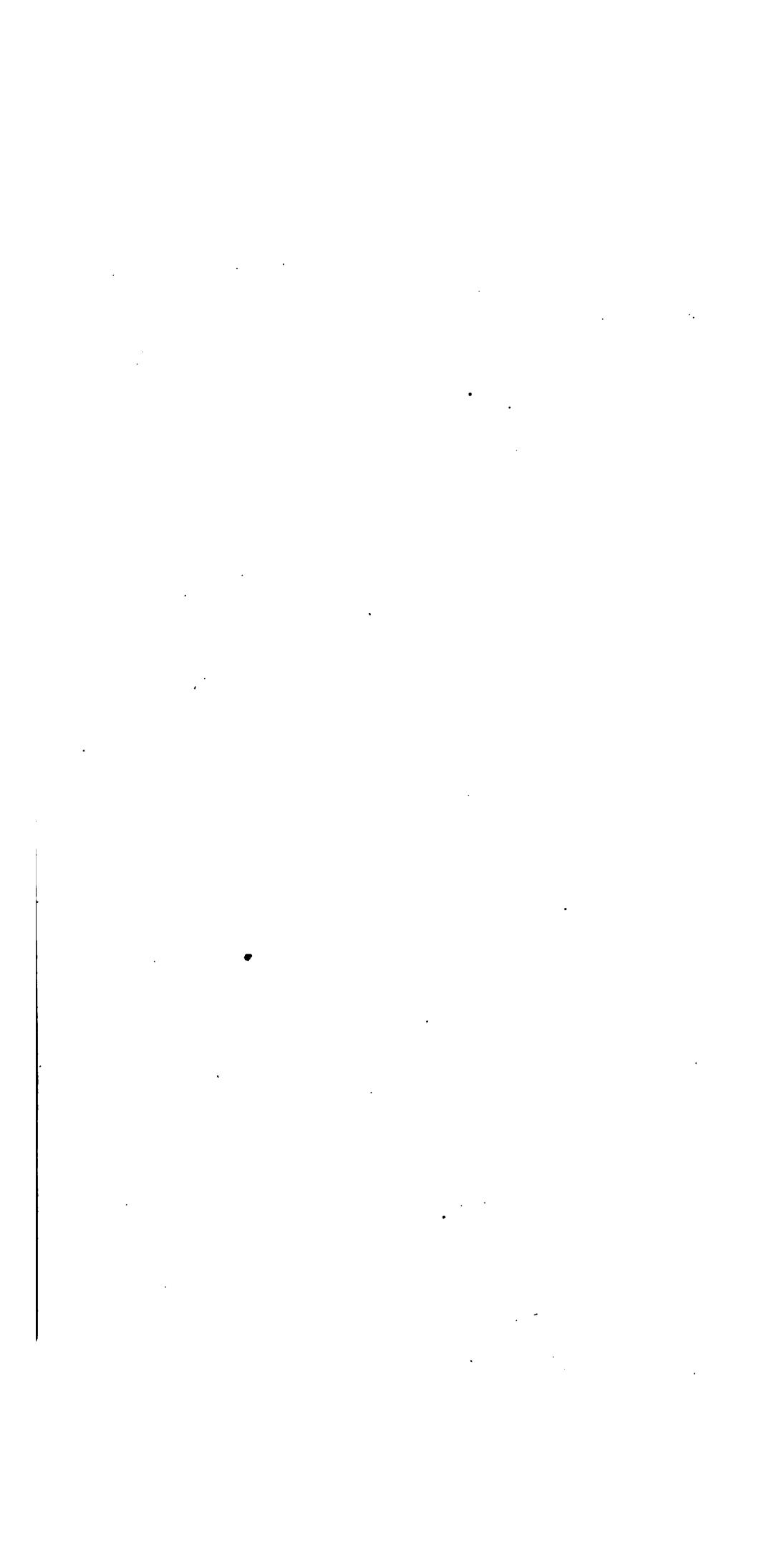
The Plaintiffs were nonsuited.

*Erskine, Bower, and Gibbs* for the Plaintiffs.

*Bearcroft and Rous* for the Defendants (*a*).

(*a*) The Plaintiffs afterwards brought another action in the Court of *C. P.* which was tried before Lord *Eldon*, *C. J.* at the sittings after *Hilary* Term, 1800, and were again nonsuited on the same ground. The terms of the charter-parties are now altered, and the ships are hired to be employed in trade and in warfare, and *on any other service whatsoever*. *Abbot on Shipping*, 281. And under this latter charter-party the Company are warranted in assisting and acting conjointly with his *Majesty's* Government, at their requisition, in sending the chartered ships upon a warlike expedition against the King's enemies, under the command

command of the King's officers placed on board the same. A ship of that description is still under the charter-party, though alterations were ordered to be made in her upper works by the Company, to enable her to carry a larger number of guns, &c. than her stipulated force; and though a King's officer assumed the command of her, and hoisted the King's broad pendant on board. *Dobree v. East India Company*, 11 *East*, 290.



A

# T A B L E

OF THE

## P R I N C I P A L M A T T E R S.

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*The references are to the pages of the present edition. The pages of the first edition are noted by crotchets in the margin.*

A.

ACTION,

*See* AUCTIONEER. ASSUMPSIT, &c.  
DECEIT. MAIL COACH. PILOT.  
WITNESS, No. 17.

1. THE Plaintiff may shew that a penal action was commenced within a year, as well after as before the objection, that it does not appear on the record is made. *Maugham qui tam v. Walker.*

Page 220

2. The proprietor of a public amusement cannot maintain an action for a libel on one of his performers, by reason whereof she was deterred from appearing on the stage. *Ashley v. Harrison.* 255
3. An action lies against the master of a vessel for purposely firing a cannon at negroes, and thereby preventing them from trading with the Plaintiff. *Tarleton v. M'Gawley.* 205
4. And it is no defence to such action that the Plaintiff had not conformed to the law of the country

- in paying the duty due to the King for his licence to trade. Page 205
5. If a ship be chartered to the East India Company for the purpose of trade or warfare, and they order her on a voyage of discovery against the consent of the owners, whereby the ship is lost, the owners may maintain an action on the case. *Lewin v. East India Company.* 318
  6. *Aliter*, if the owners consent to the voyage. *ib.*
  7. In what cases a person having the command of, and superior to another, is answerable for his misconduct. *See* 145, note.

ADMISSION,

*See* CONFIDENCE. EVIDENCE, No. 1, 2, 3, 29, 30.

ADULTERY,

*See* CRIMINAL CONVERSATION.

AGENT,

*See* ATTORNEY, No. 1. AUCTIONEER, No. 1. GRAZIER.

ANNUITY,



## A TABLE OF THE PRINCIPAL MATTERS.

### ANNUITY,

See EXECUTOR, No. 1.

1. When an annuity is rescinded after it has been paid some time, the purchaser is entitled to recover back his whole purchase money. *Beachamp v. Borret.*

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### APPRENTICE,

See PLEADING, No. 8.

1. A man who has been engaged as chief clerk and manager of a manufacture for 7 years, has served a sufficient apprenticeship within the stat. 5 Eliz. though he was never engaged in the manual labour of the business. *Smith v. Armourers and Braziers Company.*

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### ARBITRATION,

See EVIDENCE, No. 1. PLEADING, No. 18.

### ARMY,

See HALF PAY.

### ARREST,

See MALICIOUS PROSECUTION, No. 2.

### ASSAULT,

See FALSE IMPRISONMENT. SERVANT, No. 2, 3, 4, 5.

### ASSETS.

- I. Money received by an administratrix for the good will of a public house, is assets in her hands. *Worral v. Hand.*

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### ASSIGNEE of a TERM,

See BANKRUPT, No. 11. LANDLORD AND TENANT, No. 1.

### ASSUMPSIT,

See USE and OCCUPATION, &c.

1. A Plea of a tender to declaration on a promise to pay the debt of a third person, precludes the necessity of proving such promise to be in writing. *Middleton v. Brewer.*

Page 20

- 1 a. See the notes on this case as to the general effect of a plea of tender and payment of money into Court.

2. In an action of *assumpsit* on an express promise to pay for the maintenance of a bastard child, of which the Defendant was the putative father, it is no defence that he has since discovered that the child was not begotten by him. *Shaw v. Whiteman.*

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3. In *assumpsit* for money had and received, to recover back money paid to the Defendant, it is not necessary to shew that he knew he was not entitled to receive it. *Robinson v. Anderton.*

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4. For money paid, laid out, and expended, lies at the suit of a sheriff's officer who has discharged the Defendant on payment of the sum indorsed on the writ, and has been obliged to pay the rest of the debt. *Cordron v. Lord Massarene.*

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5. But not at the suit of a gaoler who has been obliged to pay money in consequence of a voluntary escape, though such escape was permitted through ignorance of the law. *Eyles v. Faikney.*

n. 195

6. Q. Whether a person paying money on an illegal consideration, can recover it back in an action for money had and received. *Pickard v. Bonner.*

289

See the note on this case.

### ATTORNEY,

See CONFIDENCE, No. 1. 3. LIMITATION OF ACTIONS, No. 5.

1. An agent to a country attorney, is not obliged to deliver a bill signed previous to the commencement of an action for his fees.

*Bridges*

## A TABLE OF THE PRINCIPAL MATTERS.

- Bridges v. Francis*, 1. *Jones, v. Price, n.* Page 2
2. But an *Attorney* cannot maintain an action against his *Client*, even for the money expended by him in a cause without delivering a bill signed. *Miller one, &c. v. Towers.* 139
3. In an action against an attorney for suffering a debtor of the Plaintiff to be superseded, proof that such debtor was a married woman, destroys the action, when the declaration states that she was indebted. *Lee v. Ayrton one, &c.* 161
4. Q. Whether the declaration would be good without stating that the original Defendant was indebted to the Plaintiff. *ib.*
5. Where a declaration states that the Defendant was an attorney of the Court of Session, the production of his bill for business done in that Court is not sufficient proof of the averment. *Green v. Jackson.* 311
4. If a bill filed against an attorney in vacation be entitled of the preceding term, and the Defendant plead the stat. of Limitations, he may shew when the bill was in fact filed. *Snell v. Phillips.* 275

### AUCTIONEER.

1. Where an auctioneer does not name his principal at the time of the sale, he is personally liable to an action for damages for not completing the contract. *Hanson v. Roberdeau.* 163
2. If one of the conditions of sale is that a certain sum *per cent.* shall be paid as a deposit, and the auctioneer accepts a less sum, he cannot afterwards object that too little was paid. 163

### B.

#### BAIL.

1. Bail above, put in by the sheriff

(who discharged the Defendant without a bail bond) may surrender the Defendant. *Res v. Butcher.* Page 226

### BAILEE,

See CARRIAGE. WAREHOUSEMAN.

### BANKRUPT,

See EVIDENCE, No. 30. PLEADING, No. 10. WITNESS, No. 1. 12.

1. Though a trader deny himself for the express purpose of becoming a bankrupt, such denial will support a commission taken out by a petitioning creditor who was not privy to it. *Roberts v. Teasdale.* 38
- 1 a. For some general rules as to the effect of a corrected Act of Bankruptcy, *see* the notes on this case.
2. If a trader deliver over a bill of exchange to another for a valuable consideration, and forget to indorse it, he may indorse it after he has become a bankrupt. *Smith v. Pickering.* 69
2. And in such case the evidence of one partner that his partner had told him *at the time* that he had paid the bill away is admissible. *ib.*

See the notes on this case.

4. Where a trader buys goods on credit and commits an act of bankruptcy, the creditor may take out a commission before the day of payment although no written security is given for a debt. *Comme semble. Henbest v. Brown.* 75
- See the note on this case as to what shall constitute a good petitioning creditor's debt.
5. To support a commission of bankruptcy it is necessary that the petitioning creditor's debt should be contracted before the bankrupt ceases to be a trader. *Dawe v. Holdsworth.* 89

6. But

## A TABLE OF THE PRINCIPAL MATTERS.

6. But if the debt be contracted whilst he is in trade, and a bond is given for it afterwards, it is sufficient. Page 89
7. If *A.* be indebted to *B.* in 100*l.* and then leave off trade, and afterwards contract a further debt, but pay more than 100*l.* without applying it to any particular account, it must be placed to pay off the old debt first, and *B.* cannot afterwards be a petitioning creditor. *ib.*
- 7 *a.* As to the general rules relating to the application of money paid, see the note on this case.
8. A schoolmaster buying books and shoes and selling them to his scholars at an advanced price, is not a trader within the bankrupt laws. *Valentine v. Vaughan.* 108
9. If *A.* fraudulently procure a bill of exchange from *B.* and afterwards become bankrupt, and his assignees receive money for the bill, *B.* may recover it from them in an action for money had and received. *Harrison v. Walker.* 150
10. If an uncertificated bankrupt carry on trade and sell goods to *A.* no one can dispute his title but the assignees. *Laroche v. Wakeman.* 190
11. Assignees of a bankrupt are not liable for the rent of premises assigned to them by the commissioners unless they take possession. *Bourdillon v. Dalton.* 312
- 11 *a.* As to what shall be deemed a taking of possession, and for some general observations on the stat. 49 *G. 3. c.* 121. see the note on the above case.
12. When an assignee is removed and assigns his interest to the other assignees, they may maintain an action against him for money had and received to recover the money received by him as assignee. *Smith v. Jameson.* 279

### BANK STOCK,

See EVIDENCE, No. 11, 12.

### BARGAIN AND SALE OF GOODS.

1. What contract considered as such. Page 57 in notes.

### BARON AND FEME,

See CRIM. CON. WITNESS, No. 9, 10.

1. No action lies for harbouring the Plaintiff's wife when she is kept by the Defendant from a principle of humanity to protect her from the ill treatment of her husband. *Philip v. Squire.* 114

### BARRISTER.

1. No action lies against him for misconduct. *Fell v. Brown.* 131
2. Or to recover back the fee given him. *Turner v. Philips.* 166

### BASTARD,

See ASSUMPSIT, No. 2. FALSE IMPRISONMENT, No. 2.

1. If the putative father of a bastard child agrees to indemnify the parish, they may demand any security they think proper. *Dickenson v. Brown.* 307

### BILL OF EXCHANGE,

See BANKRUPT, No. 2, 3. FORGERY, No. 1, 3, 4. PROMISSORY NOTE. WITNESS, No. 2, 3, 4, 5, 6, 27, 28.

1. A general receipt on the back of a bill of exchange is *prima facie* evidence of its having been paid by the *acceptor*, and will not of itself be evidence of a payment by the drawer though produced by him. *Scholey v. Walsby.* 34
2. If there is no consideration for part of a sum contained in a bill of exchange, the Jury may give damages for so much as there is a good

## A TABLE OF THE PRINCIPAL MATTERS.

- good consideration for. *Barber v. Backhouse.* Page 86
3. So if it is given as a security for the performance of an agreement, the Jury, in an action on the bill, may give so much in damages as will satisfy the injury the payee has sustained. *Ledger v. Ewer.* 283
4. Where several persons trade under a particular firm, and some, without the concurrence of the others, draw bills under that firm, all are liable to an indorsee. *Baker v. Charlton.* 111
5. It is no defence to an action at the suit of an indorsee of a bill of exchange that the bill was not stamped at the time of making it, if it has a proper stamp when produced at the trial. *Wright v. Riley.* 230
6. If the holder of a bill of exchange agrees not to sue the acceptor upon his making an affidavit that the acceptance is a forgery, and such affidavit is sworn, he cannot afterwards maintain an action on the bill though the affidavit is false. *Stevens v. Thacker.* 249
7. *Aliter*, if the affidavit is only ingrossed and not sworn. *ib.*
8. It is no excuse for not giving notice to the indorsee of a bill of exchange that the acceptor had no effects. *Wilkes v. Jacks.* 26
9. When the payee of a bill of exchange has indorsed it *in blank*, no subsequent indorsee can restrain its negotiability by a *special* indorsement. *Smith v. Clarke.* 295

### BILL OF LADING.

1. If *A.* has an equitable title to goods on board a ship, and *B.* knowing of such title, gets an indorsement of the bill of lading, he cannot recover such goods in an action of trover; but the captain will be justified in delivering the

goods to *A.* *Dick v. Lumsden.* Page 250

### BILL OF MIDDLESEX, See PLEADING, No. 12.

#### BILL OF SALE.

1. The bill of sale of vessels for inland navigation need not be registered. *Laroche v. Wakeman.* 190

#### BOND,

See EVIDENCE, No. 7, 8, 12, 24.

#### C.

#### CARRIER,

See TROVER, No. 1. WITNESS, No. 22.

1. By the custom of the river *Thames* the master of a vessel is bound to guard the goods laden into a lighter sent for them by the *consignee* until the lading is complete, and cannot discharge himself from the obligation by telling the lighterman that he has not a sufficient number of hands on board to take care of them. *Catley v. Wintringham.* 202

#### CONFIDENCE.

1. An interpreter who is present at conversations between a foreigner and his attorney is bound to the same secrecy as the attorney himself, and ought not to divulge the facts confided to him, after the cause for the purpose of which the confidence was placed is at an end. *Du Barré v. Livette.* 108
2. But a confession made by a papist to a protestant clergyman may be given in evidence. *Rex v. Sparks,* cited 109
3. An attorney who prepares deeds which are granted on an usurious consideration may be called as a witness to prove the usury. *Duffin v. Smith.* 146

CON-

## A TABLE OF THE PRINCIPAL MATTERS.

### CONTRACT.

1. When a contract shall be said to be *complete* and when *executory*, vide *Set-off*, No. 1.
2. Where a builder is employed to do work for a certain sum and additions are made, he is bound by the contract as far as it can be traced, and entitled to go on a *quantum meruit* for the excess only. *Pepper v. Burland*. Page 139
3. But if the contract is wholly abandoned, he may go on a *quantum meruit* for the whole work.

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### CORPORATOR,

*See* WITNESS, No. 24.

### COSTS.

1. If an action brought under the direction of the court of chancery is defeated by a formal objection, that court will make the party taking such objection pay all costs. *Wray v. Barwis*. 100
2. Costs paid to a defendant in equity ought to be allowed to a Plaintiff in his costs at law. *Comme semble*. *Grant v. Jackson*. 268

### COVENANT,

*See* LANDLORD AND TENANT, No. 1.

### COVERTURE,

*See* PLEADING, No. 2.

1. If a Defendant be let in to plead on the terms of not availing herself of her coverture, she cannot shew that the Plaintiff trusted her husband and not her. *Snell v. Rice*. 309

### CRIMINAL CONVERSATION.

1. No action lies for *crim. con.* committed after the husband is separated from his wife. *Bartelot v. Hawker*. 11
2. Proof that the husband volun-

tarily permitted his wife to live in a state of adultery goes to bar the action, and not merely to mitigate the damages. *Hodges v. Windham*.  
Page 53

### D.

### DECEIT.

1. To support an action for a false assertion as to the circumstances of a third person, it must appear that the Defendant intended to impose on the Plaintiff, and that the Plaintiff relied on his information. *Scott v. Lara*. 296
2. For the several cases and some general observations on this kind of actions, *see* the note on the above case.

### DEIST,

*See* WITNESS, No. 7.

### DEED,

*See* EVIDENCE, No. 7, 8. 13. 24.

### DIVORCE,

*See* WITNESS, No. 9.

### DISSENTERS.

1. On an indictment for disturbing protestant dissenters in the exercise of their religious worship, it is not necessary to prove that the oaths mentioned in the Toleration Act have been taken. *Rex v. Hube*. 181
2. German Lutherans are within the protection of that act of parliament. *ib.*
3. And it is no defence to an indictment that the Defendant entered the chapel for the purpose of asserting his right to the clerk's reading desk. 181

### DISTRESS.

1. Wearing apparel may be distrained

## A TABLE OF THE PRINCIPAL MATTERS.

ed for rent, under the statute.  
*Bisset v. Caldwell.* Page 50

E.

**EAST INDIA COMPANY,**  
See ACTION, No. 5, 6.

### EJECTMENT.

1. *Qu.* Whether a year's notice to quit is necessary where it is the custom of the country to give that notice. *Roe dem Henderson v. Charnock.* 7
2. A refusal to pay rent to a devisee in a will which was contested, is not such a disavowal of the title as to entitle such devisee to maintain an ejectment without giving a previous notice to quit. *Doe dem. Williams v. Pasquali.* 259

### ESCAPE,

See ASSUMPSIT, No. 5. WITNESS,  
No. 21.

### EVIDENCE,

See FORGERY. PERJURY. PRO-  
DUCING EVIDENCE. PLEADING.

1. If the parties agree to a reference, and either party in the course of that reference admit a fact which the Court of Chancery would have compelled him to admit, such admission may be given in evidence. *Slack v. Buchannan.* 8
2. *Aliter*, if it were an admission merely for the purpose of purchasing peace. *ib.*
3. In an action against one partner evidence may be received of the admission of another. *Comme semble. Thwaites v. Richardson.* 23
4. A copper-plate map taken by the direction of overseers of the poor of a parish, is no evidence to prove a particular spot of ground a highway. *Pollard v. Scott.* 26

5. Hand-writing cannot be proved by a comparison of hands. *Macferson v. Thoytes*, 29. *Brookbaird v. Woodley.* Page 29

6. In an action brought by one partner, another may be called as a witness to prove the debt paid to him. *Evans v. Silverlock.* 31

7. If the name of a fictitious person be put as a subscribing witness to the execution of a deed, proof of the party's hand-writing is sufficient. *Fasset v. Brown.* 33

8. So if the subscribing witness swears that he never saw it executed. *Grellier v. Neal.* 198

9. A ship-builder may be called as a witness to give his opinion as to the sea-worthiness of a ship, on the facts stated by others. *Thornton v. Royal Exchange Assurance Company.* 37

10. So may commercial men to prove the meaning of a particular expression in a letter on a commercial subject. *Chaurand v. Angerstein.* 61

11. Parol evidence cannot be given of the transfer of stock, but copies from the books of the Bank must be proved. *Bretton v. Cope.* 43

12. A transfer of stock is evidence on a plea of payment to an action on a bond. *ib.*

13. An instrument executed in the presence of a subscribing witness cannot be proved by any other person even after it is cancelled. *ib.*

14. Where one partner delivers over a bill of exchange and absconds, the other may be called as a witness to prove that his partner told him he had paid it away for a valuable consideration. *Smith v. Pickering.* 69

15. Evidence that the original Defendant acknowledged the debt, is admissible in an action against the sheriff for a false return. *Kemp-land v. Macauley.* 95

16. To prove the Defendant in a criminal

## A TABLE OF THE PRINCIPAL MATTERS.

- criminal prosecution the author of a libel, evidence of other libels written by him, on the same person and concerning the same subject, may be read. *Rex v. Pearce.* Page 106
17. So in an action to prove the malice of the Defendant. *Lee v. Huson.* 223
18. A copy of a newspaper may be read in evidence, though not stamped according to act of parliament. *Rex v. Pearce.* 106
19. To prove the publication of a newspaper, it is not necessary to produce a copy which has been actually published. *ib.*
20. Proof of the delivery of a paper to the servant of the Defendant in a criminal prosecution, is not of itself sufficient to entitle the prosecutor to give parol evidence of it. 106
21. Though a witness cannot give parol evidence of the particular contents of written accounts, he may speak to the general balance. *Roberts v. Doxon.* 116
22. A bond executed by the Defendant acknowledging himself guilty of a nuisance, is good evidence on an indictment for carrying on the same business in another place. *Rex v. Neville.* 125
23. On a question between landlord and tenant, whether rent was payable quarterly or half-yearly, evidence of the mode in which other tenants pay their rents is not admissible. *Carter v. Pryke.* 130
24. Where the subscribing witness to a deed is resident abroad, his hand-writing is to be proved as if he were dead. *Holmes v. Pontin.* 135
25. Parol evidence of the oaths required by the Toleration Act having been taken, is not admissible. *Rex v. Hube.* 181
26. On an issue whether a churchwarden ought to be elected by a select vestry or the parish at large, a record between a former churchwarden and another person is admissible evidence. *Berry v. Banner.* Page 212
27. An account in the hand-writing of a person borrowing money is no evidence for the lender in an action for usury brought against him by a common informer. *Maugham qui tam v. Walker.* 220
28. Parol evidence of a letter containing an account of the dishonour of a note of hand, is not admissible, unless notice has been given to produce the letter. *Shaw v. Markham.* 221
29. An admission in an answer to a bill filed by other creditors against the Defendant may be read as evidence against him. *Grant v. Jackson.* 268
30. If several are sued and one pleads his bankruptcy, upon which the Plaintiff enters a *nolle prosequi* as to him, he may still give evidence of the admission of such Defendant made before he obtained his certificate. *ib.*
31. A record of conviction on an indictment against a parish for not repairing a road, is *conclusive* evidence of the liability of that parish to repair. *Rex v. Inhabitants of St. Pancras.* 286

### EXECUTION.

1. If a *fi. fa.* is delivered to the sheriff, and he is directed by the Plaintiff, not to levy thereon till a future day, and in the mean time another writ is delivered, he is to levy on the first writ as if no other had been delivered to him. *Kempland v. Macauley.* 95

### EXECUTOR,

#### See ASSETS.

1. An executor in trust has a sufficient interest to entitle him to insure a life, on which the testator had

## A TABLE OF THE PRINCIPAL MATTERS.

had an annuity in his own name.  
*Tidswell v. Ankerstein.* Page 204

### EXECUTOR DE SON TORT.

1. A man who possesses himself of the goods of the deceased under the authority, and as agent of the rightful executor, cannot be charged as executor *de son tort*.  
*Hall v. Elliot, Executor, &c.* 119

### F.

#### FALSE IMPRISONMENT,

See PLEADING, No. 5, 6.

1. If when a man is apprehended, and in the custody of officers of justice, a third person espouses his cause, and insults the prosecutor, the officers may imprison such third person. *White v. Edmunds.* 123
2. A justice's warrant to apprehend a man for bastardy continues in force till fully executed, and if he be apprehended and discharged without having fully complied with the warrant, he may be again apprehended. *Dickenson v. Brown.* 307

#### FIERI FACIAS,

See EXECUTION.

#### FLEET BOOKS.

1. The *Fleet* books are *admissible*, though *weak* evidence on a question of *pedigree*. *Lawrance v. Dixon.* 185
2. But to prove a *marriage*, they are not *admissible*. *Read v. Passer.* 303

#### FOREIGN LAWS.

1. *English* courts cannot take notice of them till proved by witnesses. *Ganer v. Lady Lanesborough.* 25
2. For some general observations on the proof of foreign laws, see the note on the above case.

### FORGERY,

See BILL of EXCHANGE, No. 6, 7.

1. In an action against the acceptor of a bill of exchange, who defends himself on account of his acceptance having been forged by *A.*, evidence that *A.* had forged his acceptance to another bill, and absconded on that account, is not *admissible*. *Balcetti v. Scrani.*

Page 192

2. But on an indictment for forging a bank note, drawings of different parts of a bank note found in the custody of the prisoner are *admissible*. *Lamb's case* cited. *ib.*
3. If the holder of a bill of exchange agrees not to sue the acceptor upon his making an affidavit that the acceptance is a forgery, and such affidavit is sworn, he cannot afterwards maintain an action on the bill though the affidavit is false. *Stevens v. Thacker.* 249

### FRAUDS, (Statute of)

See ASSUMPSIT, No. 1.

### G.

#### GAOLER,

See ASSUMPSIT, No. 5.

#### GENERAL ISSUE,

See PLEADING, No. 1. 3. 9.

#### GOODS BARGAINED AND SOLD,

See BARGAIN and SALE of GOODS.

### GRAZIER.

1. A book-keeper in *Smithfield* market receiving money for beasts sold there is liable to pay such money to the owner of the beasts, and cannot apply it in payment of a debt due to him from the salesman



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man who employed him. *Goode v. Jones.* Page 235

### H.

#### HAIR POWDER.

1. Hair powder made of starch ground fine, still remains starch, and packages of more than 28lb. weight moved from one place to another must be marked as *starch*. *Aitchison v. Madock.* 218

#### HALF PAY.

1. The king may at any time stop the half-pay of an officer, upon signifying his pleasure that it shall be no longer continued. *M'Donald v. Steele.* 233

#### HAND-WRITING,

See EVIDENCE, No. 5.

#### HEARSAY,

See EVIDENCE, No. 14.

#### HIGHWAY,

See EVIDENCE, No. 4. 31. PLEADING, No. 20. WITNESS, No. 11.

#### HORSE-RACE.

1. On a wager that *A.* will trot two horses 16 miles in two successive hours, he may trot them in any manner he thinks proper. *Robson v. Hall.* 172

#### HOUSE,

See PLEADING, No. 11.

### I.

#### INDEBITATUS ASSUMPSIT,

See PLEADING, No. 7. 10.

#### INFANT.

1. *Assumpsit* for money had and received lies against an infant to recover money embezzled by him.

*Comme semble.* *Bristow v. Eastman.* Page 291

2. It is incumbent on a tradesman before he trusts an infant with what may appear to be necessities, to enquire whether he is provided by his friends. *Ford v. Fothergill.* 301

#### INSOLVENT.

1. If a creditor looks over a deed of composition proposed by his debtor and sends a letter to the debtor's attorney expressing his approbation of it, and afterwards other creditors execute it, he cannot then withdraw himself from the composition and maintain an action. *Butler v. Rhodes.* 315

#### INTERPRETER,

See CONFIDENCE, No. 1.

#### JOINT AND SEVERAL,

See PROMISSORY NOTE, No. 1.

#### JUSTICE OF PEACE,

See NOTICE TO JUSTICES. WARRANT.

1. Qu. Whether he can commit for a contempt of him when not sitting in Court. *Pettit v. Addington.* 87

### L.

#### LANDLORD AND TENANT,

See EJECTMENT. WITNESS, No. 17.

1. Qu. Whether a covenant by a lessee of a public house, that he and his assigns shall buy all the beer consumed in that house, of the lessor, is binding on the assignee. *Harley v. Pehall.* 178
2. For the cases as to what covenants of this nature bind the assignees, and the construction of them as between

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between the parties, *see* the notes on this case.

### LEGACY.

1. No action at law lies for a legacy. *Farish v. Wilson.* Page 103

### LIBEL,

*See* EVIDENCE, No. 16, 17.

1. The proprietor of a place of public amusement cannot maintain an action for a libel on an actress whereby she was deterred from appearing on the stage. *Ashley v. Harrison.* 255

### LIMITATION OF ACTIONS.

1. The Defendant saying to the Plaintiff "what an extravagant bill you have delivered me," is a sufficient acknowledgment to avoid the statute of limitations. *Lawrence v. Worrall.* 127
2. Where there is a mutual unsettled account and reciprocal demands, the statute of limitations does not attach. *Cranch v. Kirkman.* 164
3. The exception in that statute as to *merchants'* accounts, is not confined merely to persons of that description. *ib.*
4. The Plaintiff may in any stage of the cause shew when a penal action was commenced. *Maugham qui tam v. Walker.* 220
5. If a bill filed against an attorney in vacation be entitled of the preceding term, and the Defendant plead the statute of limitations, he may shew when it was in fact filed. *Snell v. Philips one, &c.* 275

### LOTTERY.

1. In an action for insuring tickets in the *Irish* lottery, the act of parliament establishing such lottery must be proved. *Williams qui tam v. Pulley.* 71
2. An illegal policy of insurance of

lottery tickets may be read in evidence without being stamped. *Holland qui tam v. Duffin.* Page 81

3. If several tickets are insured at the same time, it constitutes but one offence. 62
4. *Aliter*, if at different times on the same day. *ib.*

### M.

#### MAIL COACH:

1. The proprietors of a mail coach are answerable for any injury happening to a passenger through the negligence of their driver. *White v. Boulton.* 113

### MALICIOUS PROSECUTION.

1. If *A.* strike *B.* and *B.* return the blow, on which *A.* indicts *B.* for an assault, the bare fact of *A.* having struck the first blow is not sufficient to support an action for a malicious prosecution. *Fish v. Scott.* 184
2. In an action for a malicious arrest the Plaintiff must prove the sheriff's warrant on the writ against him. *Lloyd v. Harris.* 231

### MAP,

*See* EVIDENCE, No. 4.

### MARINER.

1. No action will lie at the suit of a sailor on a promise of the captain to pay extra wages in consideration of his doing more than the ordinary share of duty in navigating the ship. *Harris v. Watson.* 102

### MARRIAGE,

*See* FLEET BOOKS, No. 2. WITNESS, No. 10.

1. The form of words prescribed by the Rubrick for the publication of banns need not be precisely followed, that part of the act of parliament

## A TABLE OF THE PRINCIPAL MATTERS.

parliament being merely directory.  
*Page 48*  
 2. May be proved by the reputation  
 of the family. *Reid v. Passer.*

303

### MASTER AND SERVANT,

*See SERVANT. WITNESS, No. 15.*

1. If a clerk to the commissioners of taxes employs a deputy to perform the duties of his office, and new duties are imposed, whereby such deputy's labour is much increased, nevertheless he will not be entitled to an increase of salary, unless there is an express agreement for that purpose. *Bell v. Drummond, Executor, &c.* 63
2. If a master gives his servant money to buy meat for the use of the family, and the servant instead of paying ready money orders the meat on credit and embezzles the money, the master is not liable. *Stubbing v. Heinz.* 66

### MONEY HAD AND RECEIVED,

*See ASSUMPSIT, No. 3. 6. BANKRUPT, No. 9. 12. INFANT, No. 1. OFFICE, No. 1.*

### MONEY PAID, LAID OUT, AND EXPENDED,

*See ASSUMPSIT, No. 4, 5.*

### MONEY PAID INTO COURT,

For the effect of it *vid.* 21 note.

• N.

### NAVAL STORES,

*See WITNESS, No. 26.*

### NAVIGATION,

*See BILL OF SALE.*

### NEGLIGENCE,

*See MAIL COACH. SURGEON.*

### NEW ASSIGNMENT,

*See PLEADING, No. 11.*

### NEWSPAPER.

1. A newspaper may be read in evidence though not stamped. *Rex v. Pearce.* *Page 106*
2. To prove the publication of a newspaper it is not necessary to produce a copy which has been actually published. *ib.*

### NOTICE TO PRODUCE,

*See EVIDENCE, No. 28.*

### NOTICE TO QUIT,

*See EJECTMENT, No. 1, 2.*

### NOTICE TO JUSTICES.

1. If *A.* is indicted for felony, and the judge who tries the indictment orders the justice before whom the information was laid to retain the goods until it appears who is entitled to them, and such justice is guilty of a conversion, it is not necessary to give a month's notice previous to the commencement of an action against him. *Licet v. Reid.* 49

### NUISANCE,

*See EVIDENCE, No. 22.*

1. A man who sets up a noxious business in a neighbourhood where such business has long been carried on, is not indictable for a nuisance unless the noxious vapour is much increased by his manufacture. *Rex v. Neville.* 125

O.

### OATH,

*See PLEADING, No. 14.*

1. A member of the kirk of Scotland may be sworn without kissing the book. *Mee v. Reid.* 33

OFFICE

## A TABLE OF THE PRINCIPAL MATTERS.

### OFFICE AND OFFICER,

See HALF-PAY.

1. When a man brings an action for money had and received to try his title to an office, he must prove that the Defendant has received fees belonging to the office which he claims. *Green v. Hewett.* Page 243
2. The under Ushers and Cryers of the Court of King's Bench are distinct offices from the Chief Usher and Cryer, and not dependant on him. *Comme semble.* ib.

### OPINION,

See EVIDENCE, No. 9, 10.

### ORDER FOR PARTICULARS,

See SET-OFF, No. 2.

### P.

### PARLIAMENT.

1. In an action for the costs of a frivolous petition against the election of a member of parliament, it is not necessary to prove either the Defendant's subscription of the petition or a demand of the costs previous to the commencement of the action. *Cleveland v. Wilson.* 143

### PAROL EVIDENCE OF PAPERS, &c.

See EVIDENCE, No. 11. 20, 21. 25. 28. VOIR DIRE, No. 1.

### PARTNER,

See BILL OF EXCHANGE, No. 4. EVIDENCE, No. 3. 6. 14. 30. WITNESS, No. 13. 25.

1. When partners dissolve their partnership, it is incumbent on them to publish notice of such dissolution in the *Gazette*, or they will be

all liable to the action of a creditor who did not know of the dissolution. *Gorham v. Thompson.* Page 60

2. And even notice in the *Gazette* is not sufficient to affect a creditor who has not read such notice. *Graham v. Hope.* 208
- 2 a. For the several cases, and the distinctions which have been made, see the note on the above case.
3. Partners cannot deprive their debtor of his set-off by indorsing a note of hand to any one in payment of a debt due from the others to him. *Puller v. Roe.* 260

### PAYMENT.

1. If a debtor is directed by his creditor to remit bills by the post, and the bills are lost, the creditor must bear the loss. *Warwick v. Noakes.* 98
2. But in such case the person remitting should deliver the letter at the post-office, and not the bellman in the street. *Hawkins v. Rutt.* 248

### PAYMENT OF MONEY INTO COURT,

(The effect of it) 21 note.

### PEDIGREE,

See FLEET BOOKS, No. 1.

### PERJURY,

See PLEADING, No. 3. 12. 14, 15. WITNESS, No. 8. 20. 23.

1. On an indictment for perjury committed on the trial of a former cause, the prosecutor must prove the whole of the Defendant's evidence. *Rex v. Jones.* 51
2. But if the perjury was committed in answer to a question which could only arise on the cross examination, it is sufficient to prove that examination. *Rex v. Dowlin.* 227
3. If in an answer to a bill filed by A. for

## A TABLE OF THE PRINCIPAL MATTERS.

for redemption of lands assigned to him by *B.* the Defendant swears that he had no notice of the assignment, and therefore insists on tacking a bond debt due to him from *B.* to his mortgage, this is a material fact on which perjury may be assigned. *Rex v. Pepys.* Page 187

### PILOT.

1. A pilot who has the steering of a ship is liable to an action for an injury done by his personal misconduct, although a superior officer is on board. *Stort v. Clements.* 145

### PLEADING,

See ATTORNEY, No. 3, 4. SET-OFF, No. 1.

1. A plea of the general issue to an information in the Exchequer against *A.* for having smuggled goods in his possession, does not put in issue the forfeiture of the goods, and if in stating the record it is said to be an issue touching and concerning the forfeiture of the goods, it is a fatal variance. *Rex v. Hawkins.* 13
  2. On the general replication to a plea of coverture, the Plaintiff may prove that the person to whom the Defendant was married was married to another woman. *Ganer v. Lady Lanesborough.* 25
  3. A recital that an issue came on to be tried, is supported by evidence that an information containing several counts, to each of which the Defendant pleaded the general issue, was so tried. *Rex v. Jones.* 51
  4. Under the *alia enormia* in trespass, no facts can be given in evidence which might, consistent with decency, be stated on the record. *Lowden v. Goodrick.* 64
  5. Therefore on a declaration for false imprisonment the Plaintiff cannot give in evidence that he was stinted in his allowance of food, unless it is specially stated in the declaration. Page 64
  6. Or that being confined in a common prison she caught the gaol fever, unless it is specially laid as a consequence of the imprisonment. *Pettit v. Addington.* 87
- The several cases on this point collected 65, note *a.*
7. If goods are sold on the terms of sale or return, and the person receiving them does not return them in a reasonable time, the value of them may be recovered in an action for goods sold and delivered. *Bayley v. Goldsmith.* 78
- The several cases on this point collected and arranged 80, note *a.*
8. In a penal action for exercising a trade without having served an apprenticeship thereto, the Plaintiff is not obliged to prove that the Defendant used the trade all the time laid in the declaration, if it is said that he forfeited 40s. for each month. *Powell qui tam v. Farmer.* 80
  9. When the Plaintiff is in the actual possession of the close, the Defendant in an action of trespass cannot give evidence of property in a stranger under the general issue. *Philpot v. Holmes.* 97
  10. When a bankrupt promises to pay a debt due before his bankruptcy, the Plaintiff may declare generally on the original consideration. *Williams v. Dyde.* 99
  11. If *A.* be in possession of part of a house, and *B.* of the residue, and an officer enters into *A.*'s part under a writ against *B.*'s goods which are not there, *A.* may maintain trespass against the Officer for breaking and entering his house, and need not make any new assignment to a justification under the writ against *B.* *Fallon v. Anderson.* 149
  12. An indictment stating a bill of Middlesex

## A TABLE OF THE PRINCIPAL MATTERS.

- Middlesex* to have issued out of the *King's Bench Office* is bad. *Rex v. Schoole.* Page 152
13. Where money betted is paid into the hands of a banker who gives a receipt to the persons betting as received of *them*; the winner cannot recover the money on the common count on a wager, but must state that the money was so paid, and that the Defendant refused to permit him to receive it. *Robson v. Hall.* 170
14. If a witness, who is a *Scotch* covenanter, be sworn on the *Testament*, and afterwards according to the ceremony of his own country, he may be indicted for perjury as having sworn on the *Testament*. *Rex v. McCarther.* 211
15. It is sufficient in an indictment for perjury to state that the Defendant was *in due manner sworn.* *ib.*
16. Where in pleading it is stated that from time immemorial "there has been a select vestry composed of a *certain* number of select persons," it is incumbent on the party making that averment to prove that the vestry has consisted of a definite number. *Berry v. Banner.* 212
17. So if it had been stated that the vestry was composed of a *certain* select number of persons. *Comme semble.* *ib.*
18. A submission to arbitration may be given in evidence on a count on the original promise. *Kingston v. Phelps.* 299
19. An averment that the Defendant is an attorney of a particular court is not proved by the production of his bill of fees for business done in that court. *Green v. Jackson.* 311
20. An indictment against a parish for not repairing one side of a road (the other side laying in another parish) ought to state that each parish was liable to repair *ad*

*filum medium viæ*, and not merely that a certain part of the road in breadth 15 feet was out of repair. *Rex v. The Inhabitants of St. Pancras.* Page 286

### POLICY OF INSURANCE.

1. When it is said in a letter that a ship will sail from *St. Domingo* in the month of *October*, it is generally understood that she will not sail till the 25th of that month. *Charaund v. Angerstein.* 61
2. An executor in trust has a sufficient interest to entitle him to make assurance on the life of a person who has granted an annuity to his testator. *Tidswell v. Ankerstien.* 204
3. Where a policy is on a ship bound to a foreign port until she is 24 hours moored *in safety* there, and previous to such ship's arrival at her destined port, an embargo is laid on all *English* vessels in that port, and she on entering it is also detained and her crew made prisoners of war, the assured is entitled to recover. *Minett v. Anderson.* 277
4. When a ship is driven by stress of weather on an enemy's coast, and there captured, it is a loss by capture and not by the perils of the seas. *Green v. Elmslie.* 278

### PRACTICE.

1. The privilege of replying, when the Defendant in a criminal prosecution does not call witnesses, is confined to the Attorney General. *Comme semble. Rex v. Earl of Abingdon.* 310

### PRODUCING EVIDENCE.

1. A party is not obliged to produce evidence against himself, though such evidence is in Court, and he has had notice to produce it. *Lavo v. Wells.* 128
- See the note on this case.

PRO-

## A TABLE OF THE PRINCIPAL MATTERS.

### PROMISSORY NOTE,

See BILL OF EXCHANGE. WITNESS, No. 2, 3, 4, 5, 6. 27.

1. A promissory note signed by two persons, and beginning "I promise, &c." is joint and several. *March v. Ward.* Page 177

2. A man, who at the request of the holder of a note has put his name upon it and thereby been obliged to pay the contents to a *bond fide* holder, may recover the money paid from any person whose name is on the note, although he knew it was given on an illegal consideration. *Seddon v. Stratford.* 281

### Q.

#### QUANTUM MERUIT,

See CONTRACT, No. 2, 3. MASTER AND SERVANT, No. 1. SURVEYOR.

### R.

#### RECEIPT,

See STAMPS, No. 1.

1. A general receipt on the back of a bill of exchange is *prima facie* evidence of a payment by the acceptor, and will not of itself be evidence of a payment by the drawer, though produced by him. *Scholey v. Walsby.* 34

#### REMITTANCE,

See PAYMENT.

#### RES INTER ALIOS ACTA.

Where Evidence,

See EVIDENCE, No. 26, 27. 29. 31.

### S.

#### SALE OR RETURN (*Contract of*)

Its effect.

56

### SEDUCTION,

See SERVANT.

The cases collected 78, *note*.

### SERVANT,

See MASTER AND SERVANT.

1. If a clerk to the commissioners of taxes employ a deputy to execute his office, and new duties are imposed whereby such deputy's labour is much increased, nevertheless he is not entitled to an increase of salary, unless there is an express agreement for that purpose. *Bell v. Drummond, Executor.* Page 63

2. A master may maintain an action for debauching his maid servant, though he is no wise related to her in blood. *Fores v. Wilson.* 78

3. In an action for debauching a maid servant *per quod, &c.* it is not necessary to prove that she was employed as a menial servant. *ib.*

4. So in an action for beating the Plaintiff's infant son, who resided in his family. *Jones v. Brown.* 306

5. A father who permits a married man to visit his daughter as a suitor, cannot maintain an action against him for seducing her. *Reddie v. Scoolt.* 316

### SET-OFF.

1. If *A.* employ *B.* to build a waggon, and when it is finished *B.* refuse to deliver it until the money is paid, still the contract is executed, and *B.* may set off the money which was to have been paid for the waggon as for goods bargained and sold. *Semb. Dunmore v. Taylor.* 56

2. Where the Plaintiff obtains an order for the particulars of the Defendant's set-off, and upon an application to the Defendant's attorney to deliver a particular under the order, he refers to an account already delivered by his client,

## A TABLE OF THE PRINCIPAL MATTERS.

client, he is not obliged to deliver a fresh particular. *Hatchet v. Marshall.* Page 229

3. *A. B. C.* and *D.* are in partnership together, and *C.* and *D.* also trade on their separate account: the partnership of *A.* and *Co.* becomes indebted to *C.* and *D.* and to satisfy such debt they indorse a note given to them all. In an action by *C.* and *D.* as indorsees of the note, the debtor may set off any demand he has against *A.* and *Co.* *Puller v. Roe.* 260

4. It is no objection to the set-off of a debt that the Defendant had commenced an action for the recovery of it, before the Plaintiff's cause of action accrued. *Knibbs v. Hall, one, &c.* 276

### SHERIFF,

See ASSUMPSIT, No. 4. EVIDENCE, No. 15. EXECUTION.

### SPIRITUOUS LIQUORS.

1. The stat. 24 Geo. 2. against selling spirituous liquors in quantities under the value of 20s. does not extend to liquors sold for the purpose of being sold again. *Jackson v. Attrill.* 241

### STAMPS,

See LOTTERY, No. 2. NEWSPAPER, No. 1.

1. An acknowledgment of having received the acceptance of a bill of exchange, is a receipt for money within the stat. 23 G. 3. and liable to the stamp duty imposed by that stat. on such receipts. *Scholey v. Walsby.* 34

See the note on this case, where the several cases as to what shall be a receipt or acquittal requiring a stamp, are collected.

2. Where two persons by an agreement in writing lay a wager, and then by another agreement indorsed on the first, consent that the

bet shall be doubled, there must be two agreement stamps. *Robson v. Hall.* Page 172

For the several cases in which one paper writing shall be considered as one or several instruments, as to the stamp duties, see the note on this case.

3. But if there is only one stamp, the winner may recover the first bet on account thereon. *ib.*

4. An agreement not stamped cannot be given in evidence for any purpose whatever, not even to shew that the party meant to commit a fraud by that agreement. *Whitwell v. Dimsdale.* 224

See the note on this case, where several instances are mentioned in which unstamped instruments have been given in evidence for collateral purposes.

### STARCH,

See HAIR-POWDER.

### SUBSCRIBING WITNESS,

See EVIDENCE, No. 7, 8. 13. 24.

### SURGEON.

1. It is a good defence to an action brought by him that he has treated his patient ignorantly or negligently. *Kannen v. M'Mullen.* 83
2. *Aliter*, if he acted under the direction of a physician. *ib.*

### SURVEYOR.

1. He is entitled to be paid according to his labour, and not according to the amount of the bills he looks over and settles. *Upsdell v. Stewart.* 254

### T.

### TENDER,

See ASSUMPSIT, No. 1.

1. If *A.* be indebted to several persons in different sums of money, and



## A TABLE OF THE PRINCIPAL MATTERS.

and when they are all assembled together, tenders them one gross sum, which they refuse to receive, *each insisting that more is due to him*, this is a good tender. *Black v. Smith.* Page 121

2. It is not necessary to produce the money tendered when the creditor insists that more is due. *ib.*

3. A creditor cannot object to the formality of the tender, on account of a receipt being demanded, if he did not object to it on that account at the time. *Cole v. Blake.* 238

For the several cases on this subject and their result, *see* the notes on the above cases.

### TRESPASS,

*See* PLEADING, No. 4, 5, 6, 9.

### TRIAL.

1. The Court will put off the trial on an affidavit of the *attorney* that a material witness is kept out of the way. *Duberley v. Gunning.* 132

### TROVER,

*See* BILL OF LADING, No. 1.

1. If a carrier has goods to carry, and by mistake deliver them to a wrong person, *trover* lies. *Youl v. Harbottle.* 68

### V.

### VARIANCE,

*See* PLEADING.

### VENDOR AND VENDEE,

*See* WARRANTY.

### VESTRY,

*See* EVIDENCE, No. 26. PLEADING, No. 16, 17.

1. A select vestry can only be supported by immemorial usage. *Berry v. Banner.* 212

### VOIR DIRE.

1. When a witness is rendered incompetent by his examination on the *voir dire*, he may be asked any question to shew his interest at an end, though the act by which his interest is destroyed, is matter of record. *Botham v. Swingler.*

Page 285

### U.

### USURY,

*See* CONFIDENCE, No. 3. EVIDENCE, No. 27. WITNESS, 27.

1. Where a country banker discounting a bill, takes interest for the whole time the bill has to run, and instead of paying money for the bill, gives notes payable in *London* three days after sight, he is guilty of usury. *Matthews, qui tam, v. Griffiths.* 264

2. The several cases on this point collected in a note on the above case.

### USE AND OCCUPATION.

1. An action for use and occupation will not lie where the Defendant came into possession of the premises under an agreement to purchase, upon an assurance on the part of the Plaintiff that he had a long term, and where the occupation has been an injury, instead of a benefit to the Defendant. *Hearne v. Tomlin.* 212

*See* the note on this case.

### W.

### WAGER,

*See* HORSE RACE. PLEADING, No. 13. STAMPS, No. 2, 3.

### WAGES,

*See* MARINER, No. 1.

### WARE-

## A TABLE OF THE PRINCIPAL MATTERS.

### WAREHOUSE-MAN.

1. A warehouse-man is bound to common diligence only. *Califf v. Danvers.* Page 155

For the difference between carriers and warehouse-men, and where persons filling both characters shall be deemed to have, in the particular instance, acted in one or the other, *see* the notes on the above case.

### WARRANT,

*See* MALICIOUS PROSECUTION, No. 2.

1. A justice's warrant to apprehend the putative father of a bastard continues in force till fully satisfied, and if he is arrested and discharged, on a promise to give security, he may be again apprehended on the same warrant. *Dickenson v. Brown.* 307

### WARRANTY.

1. The seller is bound to disclose to the buyer all latent defects known to him. *Mellish v. Motteux.* 156
2. A. not knowing the age of a horse, but having a written pedigree, sold him according to the pedigree, at the same time saying he knew nothing of him but what he learnt therefrom, he is not liable to an action on a warranty. *Dunlop v. Waugh.* 167

### WITNESS,

*See* CONFIDENCE. EVIDENCE, No. 7, 8, 13. VOIR DIRE, No. 1.

1. A trader who has been twice a bankrupt cannot be a witness to increase his estate under the second commission, until he has paid 15s. in the pound. *Kennet v. Greenwollers.* 3

2. In an action against the maker of a promissory note, the indorser is an admissible witness to prove it paid. *Charington v. Milner.* Page 9

3. So is the drawer of a bill of exchange in an action against the acceptor. *Humphrey v. Moxon.* 72

4. *Qu.* Whether he can be a witness when it appears that he had regular notice of the dishonour. *ib.*

5. *Qu.* Whether the drawer may be admitted to prove that the acceptance was conditional. *Phetheon v. Whitmore.* 55

6. Or that the bill, though dated abroad, was drawn in *England*, and is therefore void for want of a stamp. *Adams v. Lingard.* 159

7. In order to ground an objection to the competency of a witness, he is not to be asked whether he believes in *Jesus Christ*, or the *Holy Gospels*, but whether he believes in God and a future state. *Rex v. Taylor.* 14

8. The Defendant in a former cause against whom a verdict was obtained on the perjury of the *only* witness in that cause, and who has filed a bill for relief, cannot be a witness on an indictment for that perjury, although he has since paid the money. *Rex v. Dalby.* 16

- 8 a. For the general law on this subject, *see* the note, page 17.

9. A Jewess is a good witness to prove her own divorce in a foreign country according to the rites of the Jews there. *Ganer v. Lady Lanesborough.* 25

10. And a man who has been in fact married may be a witness to prove such marriage illegal. *Standen v. Standen.* 45

11. It is no objection to the competency of a witness who comes to prove a highway, that he is owner

## A TABLE OF THE PRINCIPAL MATTERS.

- owner of an adjoining close, and has let a road to *A.* which he cannot use unless the road in dispute is established. *Pollard v. Scott.* Page 26
12. A creditor who releases to the assignees of a bankrupt is a good witness to prove an act of bankruptcy. *Koopes v. Chapman.* 28
13. In an action by one partner, another is an admissible witness to prove the debt paid to him. *Evans v. Silverlock.* 31
14. In an action for sinking a barge, on board of which the Plaintiff had a cargo of corn, the master may be a witness upon being released by the Plaintiff. *Spitty v. Bowens.* 74
15. So in an action against the owner for not safely carrying it. *Lay v. Holock.* 137
16. But the owner cannot be a witness to prove the ship sea-worthy, in an action on a policy of insurance, until released. *Rotheroe v. Elton.* 117
17. No action lies against a witness for not attending unless the cause was called on and the jury sworn. *Bland v. Swafford.* 85
18. In an ejectment between two persons (both claiming under a demise from the same person) the landlord who has become a bankrupt, may be a witness to prove that the premises in dispute were not contained in the first lease. *Longchamp, dem. Evits, v. Fawcet.* 101
19. A person about whose house business has been done by the Plaintiff, is not a good witness to prove the Defendant liable, until released by the Plaintiff. *New v. Chidgey.* 134
20. A party who has succeeded in a suit, is a good witness on an indictment for perjury committed in the course of that suit. *Rex v. D'Faria.* 141
21. A man who has been arrested may be called as a witness in an action for permitting his escape. *Cass v. Cameron.* Page 168
22. A book-keeper, who receives goods for a carrier, is a good witness for him without a release. *Spencer v. Goulding.* 176
23. It is no objection to the competency of a witness on an indictment for perjury committed in an answer in Chancery, that in his answer to a cross bill which is still pending, the witness has sworn the fact which he is to prove on the indictment. *Rex v. Pepys.* 187
24. Mere trustees of a charity may be witnesses in an action brought against themselves in their corporate capacity. *Weller v. Governors of the Foundling Hospital.* 206
25. A man who is proved to be a partner with the Defendant cannot be examined to prove that he only is liable. *Goodacre v. Breame.* 232
26. The person giving information that the Defendant concealed naval stores, may be a witness on an indictment for the offence. *Rex v. Cole.* 284
27. In an action against the acceptor of a bill of exchange the drawer may be a witness to prove that it was given on an usurious consideration. *Rich v. Topping.* 293
28. For the several cases on the subject of parties to written instruments in actions upon them between third persons, see the notes in pp. 9. 160. 294.

### WORDS.

1. Words which unexplained import a charge of felony, are not actionable if spoken in reference to a breach of contract or trespass. *Cristie v. Cowell.* 5
- 1 a. See the cases on this subject collected

## A TABLE OF THE PRINCIPAL MATTERS.

- |   |  |
|---|--|
| collected and stated in the note<br>p. 6.   | to <i>A.</i> words (not actionable)<br>spoken to <i>B.</i> may be given in<br>evidence to increase the damages.<br><i>Mead v. Daubigny.</i> Page 168 |
| 2. Words spoken at different times,<br>may be given in evidence on one<br>count. <i>Charlter v. Barret.</i> Page 32 | 4. See the several cases on this sub-<br>ject in the note p. 170.  |
| 3. So in an action for words spoken   |  |

THE END.



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